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FILED
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JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 25.

THE UNITED STATES,
Plaintiff in Error,
vs.
GEORGE W. P. C. LEE.

No. 26.

FREDERICK KAUFMAN AND RICHARD P. STRONG,
Plaintiffs in Error,
vs.
GEORGE W. P. C. LEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

REARGUMENT.

SPECIAL BRIEF FOR THE DEFENDANT IN ERROR ON THE QUESTION OF THE JURISDICTION OF THE COURT.

WM. D. SHIPMAN,
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Special Brief for the Defendant in Error on the Question of the Jurisdiction of the Court.

A variety of questions are presented by this record, but the paramount one, with which this brief will alone deal, is that of the jurisdiction of the court over the subject matter of controversy involved in the suits. The two actions originally brought appear by the record and the statement of the court below to have been practically consolidated and treated as one (3 Hughes Rep., p. 38).

The action (ejectment) was brought originally in the Circuit Court for the County of Alexandria, and subsequently removed into the Circuit Court of the U. S. for the Eastern District of Virginia, to recover possession of what is known as the Arlington estate, consisting of about eleven hundred acres of land, with the mansion house and other buildings thereon, situate in the County of Alexandria, in the State of Virginia. This estate was, for many years, and down to his death in 1857, owned in fee and occupied by George Washington Parke Custis. Mr. Custis, by his will, devised the estate to his daughter, Mary Ann Randolph (the wife of Robert E. Lee), for her use and benefit during the term of her natural life, and, at her death, to his eldest grandson, the present plaintiff (Record, pp. 74, 75). Mary Ann Randolph Lee died in 1873. On the happening of this latter event, there being nothing else in the case, not only the legal title, but the absolute possession or right of possession was complete in the plaintiff.

A brief narrative of the proceedings in the courts below, in order of time, is pertinent here.

PROCEEDINGS IN THE STATE COURT.

On or about April 12, 1877, the original defendants, about 200 in number, were served with a copy of the declaration and notice of the suit in the Circuit Court for the County of Alexandria, in the State of Virginia (Record, p. 2). The service appears to have been completed on the 13th, and the return authenticated before a notary public on the 28th of April, 1877 (Record, p. 18).

On the 7th of May, 1877, this declaration and notice, with proof of service thereof on the defendants, was filed in the clerk's office of the State Court (Record, p. 11).

On the same day the plaintiff sued out of the same court a rule on the defendants that they plead to the declaration (Record, pp. 18, 19).

This rule to plead was duly served on the defendants, and returned on or before May 11, 1877 (Record, pp. 19, 22).

On the 6th of June, 1877, the defendants appeared in the State Court, demurred to the declaration, and pleaded the general issue (Record, p. 22). The cause was then continued. (Record, p. 22).

At this point, as will be seen by the certificate of the clerk of the State Court (Record, p. 22), the proceedings in the State Court terminated.

PROCEEDINGS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Before the commencement of the term of the State Court to which the cause was continued, and on the 6th of July, 1877, the defendants filed their petition in the Circuit Court of the United States for the Eastern District of Virginia, praying for the removal of the cause from the State to the Federal Court. (Record, pp. 1, 2).

On the 9th of July, 1877, the Federal Court awarded a writ of *certiorari*, directed to the State Court to bring up the record. This was served on the clerk of the State Court July 11, 1877. (Record, p. 7).

The petition of the defendants and the writ of *certiorari* awarded, were founded on sec. 643 of the Rev. Stats., U. S., p. 116; which provides, among other things, as follows:

> "Sec 643. When any civil suit or criminal prosecution is commenced "in any court of a State against any officer appointed under or acting "by authority of any revenue law of the United States now or hereafter "enacted, or against any person acting under or by authority of any such "officer, on account of any act done under color of his office or of any "such law, or on account of any right, title or authority claimed "by such officer or other person under any such law; or is com "menced against any person holding property or estate by title derived "from any such officer, and affects the validity of any such revenue "law;" * * * * * * * *
> "the said suit or prosecution may, at any time before the trial or final "hearing thereof, be removed for trial into the Circuit Court next to be "holden in the district where the same is pending, upon the petition of "such defendant to said Circuit Court, and in the following manner. "Said petition shall set forth the nature of the suit or prosecution, and

" be verified by affidavit ; and, together with a certificate signed by an " attorney or counsellor-at-law of some court of record of the State " where such suit or prosecution is commenced, or of the United States: " stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matter se-" forth in the petition, and that he believes them to be true, shall be presented to the said Circuit Court, if in session, or if it be not, to the " clerk thereof at his office, and shall be filed in said office. The cause " shall thereupon be entered upon the docket of the Circuit Court, and " shall proceed as a cause originally commenced in that court ; but all " bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State Court. When the suit is commenced " in the State Court by summons, subpœna, petition or another process " except capias, the clerk of the Circuit Court shall issue a writ of *certiorari* to the State Court, requiring it to send to the Circuit Court the " record and proceedings in the cause."

The clerk of the State Court appears to have certified to the record of that court, July 14, 1877, which was, doubtless, the date of the return to the writ. (Record, p. 22). That record was filed in the Federal Court July 19, 1877. (Record, p. 23).

On the 16th of July, 1877, the Attorney-General of the United States filed in the Federal Court the following paper, termed in the record a " SUGGESTION AND MOTION :"

" IN THE CIRCUIT COURT OF THE UNITED STATES

" FOR THE EASTERN DISTRICT OF VIRGINIA,

" GEORGE W. C. LEE " *vs.* " FREDERICK KAUFFMAN, R. P. STRONG " AND OTHERS.	*In Ejectment.*

" And now comes the Attorney-General of the United States and sug-" gests to the court and gives it to understand and be informed (appearing " only for the purpose of this motion) that the property in controversy " in this suit has been for more than ten years, and now is, held, occupied " and possessed by the United States, through its officers and agents, " charged in behalf of the Government of the United States with the " control of the property, and who are in the actual possession thereof, " as public property of the United States, for public uses, in the erer-

"cise of their sovereign and constitutional powers, as a military station, "and as a national cemetery established for the burial of deceased "soldiers and sailors, and known and designated as the 'Arlington "Cemetery,' and for the uses and purposes set forth in the certificate of "sale, a copy of which, as stated and prepared by the plaintiff, and which "is a true copy thereof, is annexed hereto and filed herewith, under "claim of title, as appears by the said certificate of sale, and which was "executed, delivered and recorded as therein appears.

"Wherefore, without submitting the rights of the Government of the "United States to the jurisdiction of the court, but respectfully insist-"ing that the court has no jurisdiction of the subject in controversy, he "moves that the declaration in said suit be set aside, and all the pro-"ceedings be stayed and dismissed, and for such other order as may be "proper in the premises.

"CHAS. DEVENS,
"*Att'y-Gen'l, U. S.*"

CERTIFICATE OF SALE REFERRED TO IN THE ABOVE SUGGESTION AND MOTION.

"Your petitioner finds his title obstructed by a possession under a "claim of the United States, as purchaser of the said estate at a sale for "a direct tax, assessed by that Government thereon, of $92.07, with a "penalty of 50 per cent. thereof. The claim of the United States is set "forth in 'tax sale certificate' of record, in the clerk's office for the "said Connty of Alexandria, and is in the words and figures following, "to wit:

" 'UNITED STATES OF AMERICA, DISTRICT OF VIRGINIA,

" 'TAX SALE CERTIFICTAE.

" 'Whereas, John Hawxhurst, Gillet T. Watson and William I. " 'Boreman, having been, by virtue of an Act of Congress, approved " 'June 7, 1862, entitled 'An Act for the Collection of Direct Taxes " ' 'in Insurrectionary Districts, within the United States, and for " ' 'other purposes,' by the President, by and with the advise and con-" 'sent of the Senate, duly appointed tax commissioners, and thereby " 'constituted a board of three tax commissioners, for the insurrectionary " 'districts of the State of Virginia, to wit: So much of said State as " 'was by the President of the United States, by his proclamation of July " '1, 1862, proclaimed to be in insurrection, and the civil authority of " 'the Government of the United States so obstructed, that the Act of " 'Congress, approved August 5, 1861, named in the act aforementioned, " 'could not be peaceably executed, said William I. Boreman having re-" 'signed, and the President, by and with the advice and consent of the " 'Senate, having on the 28th day of January, A. D. 1864, appointed A. " 'Lawrence Foster in his stead, the undersigned, composing the Board " 'of Tax commissioners, as now constituted, do hereby certify that the " 'commissioners did, in compliance with the Acts of Congress afore-" 'said, on the 15th day of September, 1863, fix the sum of $92.07 as the

" 'amount of tax, by virtue of said Act of August 5, 1861, due and
" 'payable to the United States, charged upon the following described
" 'lot or parcel of land situated in the County of Alexandria, in said
" 'State, to wit: Arlington, on Georgetown road, northwest from the
" 'Court House nine miles, lately occupied by Robert E. Lee, and bound-
" 'ed as follows: On the north by the land of   Ross; east
" 'by the Potomac river; south by the land of James Roach,
" 'Johnson, and Guy Henry; west by the land of   Elliott,
" 'Columbus Alexander and John Tucker, containing 1,100 acres, be the
" 'same more or less, said to have belonged to Mary A. R. Lee, and
" 'charged to her on the land-book of the State aforesaid, for the year
" '1860, and valued on said book at $34,100; said sum of $92.07 bearing
" 'the same direct proportion to the whole amount of direct tax, namely,
" '$937,550.66⅔, apportioned to said State by the Act of Congress of
" 'August 5, 1861, as the value of said parcel of land, was estimated to
" 'bear to the whole valuation of real estate in the said State of Virginia,
" 'subject to said direct tax, according to the last assessment and valua-
" 'tion of said real estate, and the several parcels thereof, made under
" 'the authority of said State previous to the first day of January, A. D.
" '1861, to wit: The assessment and valuation for the year 1860, whereby,
" 'in addition to said tax charged upon said parcel of land, a sum of fifty
" 'per centum of said tax became charged thereon, and that no
" 'owner or owners of said parcel or lot of land did, within sixty
" 'days after the commissioners did, on the aforesaid 15th day of
" 'September, 1863, so fix said amount, pay the tax thus charged upon
" 'the said lot or parcel of land, into the Treasury of the United States,
" 'or to the commissioners holding said office, during said term, or to
" 'any such commissioners, at any time, by reason of which non-pay-
" 'ment said piece or parcel of land became forfeited to the United
" 'States, and accordingly the said commissioners caused the same to be
" 'advertised for sale, describing in said advertisement the aforesaid
" 'parcel of land, and distinctly stating therein said amount of $92.07 as
" 'the amount of direct tax assessed on said tract or parcel, in a newspaper
" 'published in said County of Alexandria, where said land is situate,
" 'namely, in the newspaper called the *Virginia State Journal*, published
" 'in the City of Alexandria, in said county, for four weeks previous to the
" 'day of sale; and did further advertise as above, by posting notice of
" 'said sale in three public places in said county, four weeks previous to
" 'said day of sale, which day of sale was advertised by said publication
" 'and said posting to take place on the 11th day of January, A. D. 1864,
" 'and, thereafter, on said day last named, so advertised, and at the place
" 'of sale so advertised, to wit, in said City and County of Alexandria, said
" 'commissioners did cause the same to be offered for sale to the highest
" 'bidder, who would bid a sum not less than the tax and penalty afore-
" 'said, with the lawful costs and ten per cent. per annum interest on
" 'said tax then accrued; and no person bidding the same, or a larger
" 'sum than the sum hereinafter named, and said tract, lot, or parcel of

" 'land having been selected under the direction of the President, in
" 'pursuance of an order, of which the following is a copy :

" ' 'Whereas, by the Act of 1862, chapter 98, entitled "An Act for
" ' 'the collection of direct taxes in insurrectionary districts within the
" ' 'United States, and for other purposes," it was enacted that certain
" ' 'land in said insurrectionary districts should be charged with taxes,
" ' 'and that said land should be sold for non-payment thereof, as
" ' 'therein provided ; and whereas, by the Act of 1863, chapter 21, approved
" ' 'February 6, said Act of 1862 was amended ; and whereas,
" ' 'by virtue of the power in said acts conferred, "at any such sale,
" ' 'any tracts. parcels, or lots of land which might be selected, under
" ' 'the direction of the President, for Government use, for war, military,
" ' 'naval, revenue, charitable, educational, or police purposes,
" ' 'might at said sale be bid in [by the commissioners appointed under
" ' 'said act], under the directions of the President, for and struck
" ' 'off to the United States.

" ' 'And whereas, the President, with the advice and consent of the
" ' 'Senate, has, in pursuance of law, appointed John Hawxhurst, William
" ' 'I. Boreman, and G. F. Watson as tax commissioners within
" ' 'and for the State of Virginia ; and whereas, the real estate hereinafter
" ' 'described has become charged with taxes to the United States,
" ' 'and by reason of the non-payment thereof, and of the penalty lawfully
" ' 'assessed thereon, is forfeited to the United States, and has become
" ' 'liable to be sold under the provisions of the acts aforesaid ;
" ' 'and whereas, the said estate has been advertised to be sold for non-payment
" ' 'of said taxes and penalty on the 11th day of January,
" ' '1864, according to law ; and whereas, the President of the United
" ' 'States, by virtue of the authority vested in him as aforesaid, has
" ' 'selected for Government use, for war, military, charitable, and
" ' 'educational purposes, the land hereinafter described :

" ' 'Now, therefore, I, Abraham Lincoln, President of the United
" ' 'States, have ordered and directed, and hereby order and direct,
" ' 'said commissioners to bid in and have struck off to the United
" ' 'States the following described tract of land, for the purposes aforesaid,
" ' 'and in pursuance of the statutes on that behalf provided,
" ' 'namely, the Arlington estate, lately occupied by Robert E Lee,
" ' 'bounded as follows : north, by the land of   Ross ; east, by the
" ' 'Potomac river ; south, by the land of James Roach,   Johnson,
" ' 'and Guy Henry ; west, by the land of   Elliot, Columbus
" ' 'Alexander, and John Tucker ; containing eleven hundred acres, be
" ' 'the same more or less.

" ' 'ABRAHAM LINCOLN,
" ' '*President of the United States.*

" ' 'Executive Mansion,
" ' 'Washington, 6th Jan., 1864.'

" 'For Government use for war, military, charitable, and educational
" 'purposes, said commissioners did bid in the same to the

" 'United States for the sum of twenty-six thousand and eight hun-
" 'dred dollars, being not less than the taxes, penalty, and cost, and
" '10 per cent. per annum interest on said taxes.

" 'In testimony whereof, said commissioners have hereunto affixed
" 'their signatures, on this 25th day of September, A. D. 1866.

" 'JNO. HAWXHURST,
" 'GILLET F. WATSON,
" 'A. LAWRENCE FOSTER,
" '*United States Direct Tax Commissioners*
" '*for Virginia.*' "

" 'STATE OF VIRGINIA, } to wit :
" 'Alexandria County, }

" 'Personally appeared before me, a justice of the peace for the State
" 'and county aforesaid, John Hawxhurst, Gillet F. Watson, and A.
" 'Lawrence Foster, parties signing the above paper, and they severally
" 'acknowledged the same to be their act and deed.

" 'Given under my hand, this 7th day of March, 1867.

" 'ROBERT BELL,
" '*J. P.*' "

" 'VIRGINIA :
" 'Alexandria County Court,
" 'CLERK'S OFFICE, March 7, 1867.

" 'The foregoing certificate of sale, with the acknowledgment, was
" 'this day admitted to record.

" 'Teste :
" 'JEFFERSON LACY,
" '*Clerk.*' "

On the filing of this paper by the Attorney-General the court, July 19, 1877, issued an order on the plaintiff to show cause, on the 4th of September next following, why, for the reasons set forth in the "suggestion" of the Attorney-General, the motion to set aside the declaration and dismiss the proceedings should not be granted. (Record, pp. 26, 27). By stipulation of counsel the hearing of this motion was postponed.

On the 2d of March, 1878, the plaintiff filed his answer to the order to show cause why the motion of the Attorney-General should not be granted. This answer (Record, pp. 29, 30) is as follows :

" IN THE CIRCUIT COURT OF THE UNITED STATES

" For the Eastern District of Virginia.

" George W. C. Lee,
" *Plaintiff*,
" *against*
" Frederick Kauffman, R. P. Strong
" and als.,
" *Defendants.*

" The plaintiff, not waiving, but still, so far as he may lawfully do, " insisting upon his motion to remand the cause to the State court, for an " answer to the summons requiring him to show cause why the motion " of the Attorney-General of the United States to set aside the declaration and to dismiss the proceedings in the above entitled cause, for the " reasons set forth in a suggestion of the said Attorney-General, which " has been filed therein, should not be granted, says, and for cause " shows :

" 1st. That said suggestion should be dismissed as not being a proper " mode of making an objection to the jurisdiction of the court.

" 2d. That said suggestion and the matters therein contained, in " manner and form as they are therein set forth, are not sufficient in law " to sustain said motion, or to show that any relief whatsoever should be " granted under the application made by said Attorney-General ; and " that the plaintiff ought not to be required to make any further or other " answer thereto.

" 3d. If this, his demurrer, should be overruled, and he should be " required to make further answer to said suggestion, the plaintiff " says :

" That he does not admit to be true, as is set forth in said suggestion, " that the United States are in possession of the property in controversy " in this suit by their officers and agents, charged on behalf of the " Government with the control of the property.

" One of the defendants, Maria C. Syphax, is in possession of and " holds a portion of said property under an Act of Congress, approved " on the 12th of June, 1866, entitled 'An Act for the relief of Maria " Syphax' (14 *U. S. Statutes at Large, chapter CXXI., p.* 589), whereby the title to seventeen acres and fifty-three one-hundredths of an " acre, be the same more or less, being a part of the property in controversy in this suit, was released and confirmed unto the said Maria " Syphax, her heirs and assigns, the said Maria C. Syphax and the said " Maria Syphax being one and the same person.

" The plaintiff is informed, and believes it to be true, that a very " large majority of the other defendants are in fact tenants of the Gov-

" ernment of the United States, rendering valuable services in work and
" labor done and peformed by them for said Government, in considera-
" tion of being permitted by it to occupy and use the lands of which
" they are respectively in possession.

" The plaintiff further says that the United States have no other or
" further title to the property in controversy in this suit than that which
" was acquired by them as purchasers at a sale thereof for taxes made
" by John Hawxhurst, Gillet F. Watson, and A. Lawrence Foster, as
" United States Direct-tax Commissioners for Virginia, and shown by
" their certificate of sale, a copy of which is filed with said suggestion,
" and that the consent of the State of Virginia has never been obtained
" to such purchase.

" The plaintiff, therefore, denies it to be true, as is set forth in said
" suggestion, that the property in controversy in this suit has been or is
" now held, occupied or possessed by the United States through their
" officers and agents charged in behalf of the Government of the United
" States with the control of the property, and who are in the actual
" possession thereof as public property of the United States, for public
" uses, in the exercise of their sovereign and constitutional powers, and
" calls for full proof of each and all of said allegations.

" G. W. C. Lee."

It will be noticed that this answer to the rule granted on the intervention of the Attorney-General contains both a demurrer and traverse, a proceeding sanctioned by the practice prevailing in Virginia, and adopted in this case by both parties.

After full argument on the question of law thus raised, the court below sustained the demurrer, and entered its judgment accordingly. (Record, pp. 31-60, 61). To this decision of the court the defendants do not appear to have entered any formal exception. But the same question was raised (though in rather a peculiar form) in the prayer of the defendants for instructions to the jury, which were denied by the court, to which denial the defendants excepted. (Record, pp. 103, 104).

The record having been brought here by the United States, the first question to be considered is, of course, whether there was error in the judgment of the court below, in overruling the motion of the Attorney-General, and retaining jurisdiction of the cause; and that is the only question with which this brief will attempt to deal.

I.

It may be conceded, as a general proposition, that the political corporation known as the United States cannot be directly sued, either at law or in equity. They are exempt from coercive legal process on the ground that they are a sovereign power, not amenable to the jurisdiction of the civil tribunals. So much of the modern English law on the subject seems to have been adopted by the courts of this country; though the doctrine has been stigmatized by one very learned justice of this court as "a branch of a much more extensive principle, on which a plan of systematic despotism has lately been formed in England and prosecuted with unwearied assiduity and care."

Wilson, *J., in Chisholm* v. *Georgia,* 2 *Dal.*, 458.

The same doctrine was repudiated by a Chief Justice of this court.

Jay, *C. J., Ibid, pp.* 472, 473.

I term the exemption of the sovereign power from suit *modern* English doctrine, for it clearly is such.

Wilson, *J., Ib., p.* 460.

II.

It is proper here to note to what extent this doctrine has been sanctioned by this court. For that purpose, a brief reference to the cases decided here, which are often, and sometimes rather loosely, cited, both by text writers and in judicial opinions, will be pertinent:

United States v. *Clarke* (8 *Pet.*, 436), was a suit brought against the United States under the Act of May 26, 1830 (4 *Stats at Large, p.* 405), for the settlement of land claims in Florida. The jurisdiction conferred on the courts under that act was special and limited, and it was held by this court that the averments of the petition which constituted the initiatory step in the suit must be such as to bring the case within the scope of the statute, or the jurisdiction would fail. In delivering the opinion, MARSHALL, *C. J.*, remarked:

> "As the United States are not suable of common right, the party "who institutes such suit must bring his case within the authority of "some act of Congress, or the court cannot exercise jurisdiction over it. "The counsel for the United States contends that George J. F. Clarke "has not, by his petition, made a case in which the United States have "consented to be sued, and, consequently, that the court of the district "had no jurisdiction. To maintain this objection, he has stated several "principles, and cited several decisions of this court in support of "them. The proposition, that in courts of a special limited jurisdiction, "which that of East Florida unquestionably is in this case, the "pleadings must contain averments which bring the cause within the "jurisdiction of the court, or the whole proceeding will be erroneous, "is admitted. The inquiry is, does the petition of George J. F. Clarke "contain these averments?"

After an elaborate examination of the subject the court came to the conclusion that the petition did contain the necessary averments, and that, therefore, the court had jurisdiction.

In the *U. S.* v. *M'Lemore* (4 *How.*, 286), a bill in equity had been brought in the court below to enjoin the collection of a judgment which had been recovered by the United States, but which the bill alleged had been paid. On reference by the court below to a Master, he ascertained and reported that not only had the judgment been paid, but there was a balance due from the United States to the complainant. The court thereupon granted a perpetual injunction, and also rendered a decree for costs against the United States. On appeal to this court, the bill was dismissed for want of jurisdiction. That part of the opinion relating to this question is extremely brief, and is as follows:

> "There was no jurisduction of this case in the Circuit Court, as the "Government is not liable to be sued except with its own consent, given "by law. Nor can a decree or judgment be entered against the Government for costs."

The court went on further to state, in substance, that the plaintiff had a remedy at law, inasmuch as the Circuit Court, as a court of law, could direct credits to be given on the judgment, and order satisfaction of it to be entered. And further, that pending an examination of the matter, that court had power to stay execution. The remedy of the plaintiff was, therefore, complete in the court where the judgment had been rendered.

In *Hill* v. *U. S.* (9 *How.*, *p.* 386), a bill in equity had been brought in the Circuit Court to enjoin the United States from collecting a judgment which had been rendered at law in their favor. The United States moved to dismiss the bill for want of jurisdiction. The judges of the Circuit Court being divided in opinion as to the propriety of this motion, the question was certified to this court, which decided that the motion on behalf of the Government should be granted, and the bill dismissed, and it was so certified to the court below.

The opinion of the court in this case is also exceedingly brief, closing with the remark that—

> "Without dilating upon the propriety or necessity of the principle "here stated, or seeking to multiply examples of its enforcement, we "content ourselves with referring to a single and recent case in this "court, which appears to cover the one now before us in all its features. "We allude to the case of the *United States* v. *M'Lemore, in* 4 *How.*, "286, where it is broadly laid down as the law, that a Circuit Court can"not entertain a bill on the equity side of the court, praying that the "United States may be perpetually enjoined from proceeding upon a "judgment obtained by them, as the Government is not liable to be "sued, except by its own consent given by law."

In *Reeside* v. *Walker* (11 *How.*, 272), a mandamus had been refused by the Circuit Court for the District of Columbia to compel the Secretary of the Treasury to enter on the books of the Treasury Department, to the credit of the estate of James Reeside, a large sum claimed to have been found due from the United States to him, by the verdict of a jury in his favor, on a set-off pleaded by him to a suit brought against him by the United States. This court held, in the first place, that there was no judgment on the verdict in favor of Reeside for the amount claimed; and, in the second place, that there was no law requiring the Secretary of the Treasury either to enter such claim on his books or pay the same.

There being, therefore, no legal or ministerial duty required of the Secretary by law in the premises, no mandamus would lie.

In the discussion of the case, in the opinion of this court, it was also incidentally stated, that—

> "It is well settled, too, that no action of any kind can be sustained "against the Government itself for any supposed debt, unless by its "own consent under some special statute allowing it." * * * *
>
> "The sovereignity of the Government not only protects it against "suits directly, but against judgments even for costs, when it fails in "prosecutions."

The case of *Nations* v. *Johnson* (24 *How.*, *p.* 195), is sometimes cited on this point. It has no bearing whatever on the question beyond what may be inferred from an incidental observation of the court in illustrating the distinction between writs of error and original process. On this point, the court says (p. 204):

> "Suits cannot, under the judiciary act, be commenced against the "United States; and yet writs of error, accompanied by citations, have "uniformly issued for the removal of judgments recovered in favor of "the United States into this court for re-examination. Such cases are "of daily occurrence, and the judgments are here reversed or affirmed as "they are, with or without error; and it has never been supposed that "the writ of error in such cases, though sometimes involving large "amounts, was a suit against the United States."

There was no question of jurisdiction, in that case, of the character of the one now under consideration. Neither the United States, nor any State, was a party to the suit, either directly or indirectly.

The case of the *Siren* (7 Wal., 152) is no doubt fresh in the mind of the court. That was a case in which a vessel had been captured *jure belli* by a steamer belonging to the navy of the United States. The captured vessel was in charge of a prize crew on her way to Boston. On the voyage she came in collision with and sunk another vessel. She proceeded to Boston, where she was libelled by the United States, condemned as lawful prize, sold, and the proceeds deposited subject to the order of the court. Thereupon the owners of the sunken vessel intervened and prayed that they might be allowed, out of the proceeds in the registry of the court, compensation for the loss of their vessel, which they averred to be in consequence of the carelessness of those in charge of the vessel which had been condemned and sold, and therefore constituted a lien on the offending vessel which attached to the proceeds of her sale. The District Court denied the right of intervention and dismissed the petition, from which an appeal was taken to this court, where the decree below was reversed, on the ground that although a claim under such circumstances could not be enforced directly against the offending vessel, yet inasmuch as the United States had subjected that vessel and her proceeds to the jurisdiction and control of the court, the Government stood in that matter in the same position as a private suitor, except that affirmative relief could not be granted against it either by way of damages or costs.

The case of the *Davis* (10 Wal., 15), originated in the Southern District of New York. The *Davis*, with her cargo was libeled. Among the cargo was a lot of cotton belonging to the United States which had been shipped at Savannah on board the vessel for New York.

The District Court held that the cotton, being the property of the United States, was not liable to be proceeded against for the enforcement of the salvage claim. The libel was, therefore, dismissed, so far as the cotton of the Government was concerned, and salvage allowed against the vessel and the remaining part of the cargo.

On appeal to the Circuit Court, the latter reversed the ruling below as to the Government cotton, and held that the latter was equally liable with the vessel and the rest of the cargo, for the claim of the salvors. The latter judgment was, on appeal, affirmed by this court.

The cases above cited are the principal ones in which the doctrine of the exemption of the sovereign power from suit has been dwelt upon, or in which it is supposed to have been affirmed, except the cases of *Carr* v. *The United States* (98 *U. S., p.* 43), and *James* v. *Campbell,* decided at the last term, both of which will be referred to hereafter.

These cases may be said to affirm the following propositions:

First.—That no suit can be maintained directly against the United States without their consent expressed in an Act of Congress.

Second.—As a necessary consequence, this immunity of the sovereign power from suit cannot be waived by any officer of the Government, nor by all of them combined.

Third.—That the property of the United States, to which they have an *undisputed title,* cannot be proceeded against, and their officers dispossessed for the purpose of enforcing a lien on such property.

This is the scope and extent of the authority of the cases. Nothing more need be said touching the cases in which it was sought to sue the United States directly. In regard to those in which it was sought to lay hold of the *property* of the United States, the primary *title* of the latter was conceded. The same remark applies to the somewhat celebrated case of *Briggs* v. *The Light Boats* (11 *Allen* 157). In that case not only possession, but title, was admitted to be in the United States for public use.

It should not be forgotten that in the recent cases of the *Siren* and the *Davis,* the decisions *affirmed* the jurisdiction of the court, and that the observations touching the *exemption* of the sovereign power and its property from suit were merely incidental and by way of illustrating the general subject relating to the questions to be determined.

III.

We are aware of no case in which it has ever been held in this country that the *mere possession* of the agents or officers of the Government, of however high rank, without valid title in the Government itself, exempted them from suit and ousted the jurisdiction of the court. This court has practically and repeatedly repudiated any such doctrine, as will be clearly seen by an examination of several cases which cover the period from 1815 to 1870.

Meigs v. *M'Claug's lessee*, 9 *Cranch*, 11.
Wilcox v. *Jackson*, 13 *Pet.*, 498.
Brown v. *Huger*, 21 *Howard*, 305.
Grisar v. *McDowell*, 6 *Wall.*, 363.
Cooley v. *O'Connor*, 12 *Wall.*, 391.

These were all actions to try the title and right to the possession of land. In four of them the land was in the possession of the defendants as officers of the United States, disavowing any right or title in themselves as individuals, but claiming to hold the same as public property of the United States. In the fifth case the defendants claimed as tenants of the United States, and the latter assumed the defense of the suit. A brief statement of each of these cases will be pertinent here.

In *Meigs* v. *M'Clung's lessee*, the suit was ejectment, and the plaintiff claimed the land under a grant from the State of North Carolina to his grantor. The United States claimed title under an Indian treaty of a date subsequent to that under which the plaintiff (defendant in error) claimed. The defendants resided on the land as officers, and under the authority of the United States, who had a garrison there, and had erected works at an expense of $30,000. The question of title to the land in controversy turned on the construction of an Indian treaty with the United States. The judgment below was in favor of the plaintiff, and this court on appeal affirmed that judgment. The possession of the land by the United States, as public property, under claim of title, through their officers, was not permitted to oust the jurisdiction of the court. It cannot be said that the question was waived, for it has always been held by this court that the exemption of the Government from suit is a matter which can only be waived by a law of Congress. Besides, it is distinctly stated in the report of the case that "the defendants' counsel objected, and insisted that the defendants were entitled to recover against the plaintiff, because the Indian title was not extinguished; *and because the land was occupied by the United States troops, and the defendants, as officers of the United States, for the benefit of the United States, and by their direction.*" The court was thus confronted with the very core of the question raised by the United States in the present suit. In delivering the opinion of the court, **MARSHALL**, *C. J.*, said:

> "The facts that the agents of the United States took possession of "this land lying above the mouth of the Highwassee, erected expensive "buildings thereon, and placed a garrison there, cannot be permitted to "give an explanation to the treaty, which would contradict its plain "words and obvious meaning. The land is certainly the property of "the plaintiff below; and the United States cannot have intended to "deprive him of it by violence and without compensation. This court "is unanimously and clearly of opinion that the Circuit Court committed "no error in instructing the jury that the Indian title was extinguished "to the land in controversy, *and that the plaintiff below might sustain his "action.*"

In *Wilcox* v. *Jackson*, the action was ejectment, and the case was heard on an agreed statement of facts. In that agreed statement are the following clauses:

> "It is admitted that the defendant, Wilcox, at the commencement of "this suit, and at the time of the service of the declaration in ejectment "herein, was in the occupancy and possession of the premises in said "declaration mentioned, which is a stockade of pickets, including some "wooden buildings, in which the soldiers and officers reside, and that "the rents and profits of said premises then was, and still are, of the "value of three dollars per month. It is also admitted that said de- "fendant, Wilcox, then was, and still is, an officer in the United States "army, and was ordered into possession and command of the military "post on the premises, together with the United States troops under his "command, by order of the Secretary of War of the United States; "and that said Wilcox claims no right of ownership in himself to the "land, but is in possession of and occupies the same not in his own "right, *but as an officer of the army of the United States only, in the com- "mand of the post, acting under order of the Secretary of War, and of his "superior officer, and of the United States.*"

The land in question was originally part of the public domain and had been in the occupancy of the United States for military purposes for more than thirty years, and was so occupied at the commencement of the suit. After a statement of the facts in detail, MR. JUSTICE BARBOUR, in delivering the unanimous opinion of this court, remarks :

> " Upon this state of facts two questions arise which, in our opinion, " embrace the whole merits of the case ; and which we will now proceed " to examine. The first is, whether, under the facts of the case and the " law applying to them, Beaubean (the grantee of the plaintiff's lessor) " acquired any title whatever to the land in question ? The second is, " whether, if he did acquire any title at all, it is such an one as will " enable the lessor of the plaintiff to recover in this action ?"

The purposes of this discussion do not require a notice of the manner in which the court deals with the questions in detail. But the fact that the court perfectly understood that it was dealing with land in the possession of the officers of the United States, under claim of authority from and title in the latter, looms up in the record and in the opinion of the court.

MR. JUSTICE BARBOUR, in his statement of the facts, says :

> " Wilcox went into and continued in possession, claiming no right of " ownership, but as an officer of the United States only, in command of " said post, acting under the orders of the Secretary of War, his superior " officer, and of the United States.

After discussing the first question, and stating the conclusion of the court thereon to be that, " Beaubean acquired no title whatever to the land in question," the opinion proceeds :

> " This being the case, it would not be absolutely necessary to decide " the second question ; but as it arises in the case, and has been fully " argued, we will bestow upon it a very brief examination. That ques- " tion is, whether, if he had acquired any title at all, it was such an one " as would enable the lessor of the plaintiff below to recover in this " action ? Wilcox, the defendant in the original suit, did not claim or " pretend to set up any right or title in himself. He held possession as " an officer of the United States, and for them and under their orders. " This being the state of the case, the question which we are now exam- " ining is really this, whether a person holding a register's certificate, " without a patent, can recover the land as against the United States."

The effect of this register's certificate as a muniment of title to what had been public lands (the land in controversy having been of that character) as against the United States, depended upon certain acts of Congress then in force, and especially on the Act of 1836. After commenting on the latter act, and stating that, as a general rule, a patent only passes a perfect title to public lands, the court adds:

> " This, then, being the case, and this suit having been *in effect against* " *the United States*, to hold that a party could recover against them would " be to hold that a party having an inchoate and imperfect title could " recover against the one in whom resided the perfect title. This, as a " general proposition of law, unquestionably cannot be maintained."

The judgment of the court below was reversed, not on the ground that the court had no jurisdiction of the cause, but for errors of law relating to the merits of the controversy.

Brown v. *Huger* was an action of ejectment against an officer of the United States in possession of land, under their authority. Documents were put in evidence for the defense from which it was claimed that the United States had acquired a perfect record title to the lands in question—the last links in the chain of title being " conveyances from the devisees of Robert Harper to George Washington, President of the United States, and his successors, on behalf of the United States."

> "The defendant further proved that the United States had, between " the years 1796 and 1800, erected and established on the land in con- " troversy the necessary buildings for an armory and arsenal for the " manufacture and repair of arms, and had held, occupied and used, for " the purposes aforesaid, the land and buildings from the years above " mentioned to the present time. That the defendant is an officer in " the military service of the United States, attached to the Ordnance " Department, and as such was in charge and in possession of the land " in controversy, with the buildings thereon, and the armory of the " United States at Harper's Ferry, under an order from the Ordnance " Department, and that the lands aforesaid had been in the like charge " of his predecessors, under orders and appointments from the Ordnance " Office or War Department of the United States, from May, 1829, to " the period when the defendant took possession, and that prior to the " year 1829, and as far back as the year 1800, the said lands and build- " ings were in charge of other persons in the service of the United " States at said armory."

This court, instead of dismissing the case for want of jurisdiction, proceeded to consider it at length, and affirmed the judgment of the Circuit Court on the merits.

The case of *Grisar* v. *McDowell* was also in the nature of an action of ejectment. It was originally tried in the Circuit Court of the United States for California, where judgment was for the defendant, and from that judgment a writ of error was taken to this court.

The opening sentences of the opinion of this court, delivered by MR. JUSTICE FIELD, shows the position of the parties, and the ground of the controversy. This opinion says:

> "The premises, for the possession of which this action is brought, " are situated within the City of San Francisco, in the State of Cali- " fornia. The plaintiff claims to be seized in fee of them, and derives " his title from the City of San Francisco, under an ordinance of the " Common Council for the settlement of land titles in the city, passed " on the 20th of June, 1855, commonly known as the Van Ness Ordin- " ance, and the act of the Legislature of the State ratifying and con- " firming the same.
>
> "The defendant is an officer in the army of the United States, com- " manding the Military Department of California, and as such officer " entered upon the possession of the premises previous to the com- " mencement of this action, and has ever since held them under the " order of the Secretary of War, as part of the public property of the " United States reserved for military purposes."

The city originally claimed the premises in question (with others), as part of what was known as Pueblo lands, under the laws of Mexico. It was held, however, that the city could have only an imperfect title to such lands under the laws of Mexico until they had been definitely assigned, and that such assignment was subject to the paramount authority of the Government and under its control. No such assignment having been made before the conquest of California and the cession of it to the United States, after the latter event these lands were liable to be treated by the Government as part of the public domain. As early as 1850 the President of the United States had ordered that these lands should be reserved and dedicated to public uses by the United States. One of the principal questions was as to the validity of the reservation of the lands by the President. It was claimed by the plaintiff below that the act of the President was without authority. It was held below, and affirmed by this court, that the order of the President was valid, but if not, that the lands, having been part of the public domain, and the United States never having transferred, or been divested of, its title, they still remained the property of the United States. The whole case was considered by this court on its merits.

Thus it will be seen that in all four of these cases the actions were brought against the officers of the United States in possession of the land by the alleged authority of the latter, for their use and benefit as public property. The Government so regarded them and assumed their defense—in three of them the Attorney-General of the United States appearing on the argument in this court, and in the other a former Attorney-General, evidently as special counsel for the Government.

It is plain that this court in all these cases regarded its jurisdiction to pass on the title of the United States, when that title was set up by their officers as a justification of their possession, as unquestionable. The question of the exemption of the Government from suit on the grounds set up by the Attorney-General in this case confronted this court on the very threshhold of each of these causes. In *Meigs* v. *McClung*, the point was distinctly taken and insisted on by counsel. In *Wilcox* v. *Jackson*, it was sharply presented by the agreed statement of facts. In *Grisar* v. *McDowell*, it was raised by the pleadings. In *Brown* v. *Huger*, it was a prominent feature in the case. It is unnecessary to repeat that the defect of jurisdiction was not cured by the consent of the officers of the United States or their counsel, for no such consent could be effectually given by them. Nothing short of an Act of Congress could waive the exemption and confer jurisdiction on the court, if such exemption actually existed.

The fifth case cited under this head (*Cooley* v. *O'Connor*, 12 Wall., 391) differs from the four preceding ones in the fact that the defendants were in possession of the lands as tenants of the United States, and that the latter were the mere owners of the land, having purchased it at a tax sale. The statement of the case is that—" The defense set up was, that the defendants entered and held the property as tenants of the United States, and that the United States had become owners by virtue of the tax sale already mentioned " (12 Wall., 393).

There does not appear to have been any averment that the land was devoted to military or other distinctive public uses, as was the fact in the four other cases.

But the possession of the tenants of the United States and the title of the latter were directly assailed.

The jury having given a verdict for the plaintiff, and the court rendered judgment thereon, on the writ of error in this court, the latter reversed the judgment, not on the ground of want of jurisdiction, but because of certain errors which had intervened in the trial of the cause. It, therefore, instead of dismissing the case for want of jurisdiction, awarded a *venire de novo.*

The scope and effect of these decisions are obvious. They fully recognize the right of the private citizen to bring into court any other citizen who has invaded his legal rights, even though the defendant be a public officer of the Government. If the latter pleads the authority of his Government in bar of the action, he must show that such authority is founded on some law. The powers of the Government, which it legally can wield, or confer upon its officers and agents to wield, are the creatures of *law*, and their exercise must be authorized by law or the acts done under color of the authority are void and furnish no protection to the officer. If the latter inflicts violence on the person of a citizen, he is responsible for the consequences, unless he can shelter and justify his act under the law. If he takes the property of a citizen, he is responsible in damages, and, if real property, is bound to restore it, unless he can justify the seizure and detention by law. If he pleads title in the Government, his principal, as his justification, he must prove it to be a valid title; and, as a necessary consequence, the validity of the title set up as a defense is open to question, consideration and determination by the court. If the title set up fails the defense fails. Under any other rule, practice or theory, the Government would practically be no longer a Government of *law.* Its agents and officers would exercise purely arbitrary power; and, as Burke well says: "Law and arbitrary power are in eternal enmity."

It was to prevent the exercise of arbitrary power in dealing with the person and property of the citizen that the principle was imbedded in the Constitution, that no man should "be deprived of life, liberty or *property* without due process of *law*"—law, as distinguished from the will of the executive agents and officers of the Government, civil or military. This provision of the Constitution is utterly at war with the idea that the latter can take or hold the property of the citizen without warrant of law, and then interpose the plea of sovereign prerogative, thus shutting out all inquiry into their acts and closing every avenue of redress. I use the words "sovereign prerogative" as precisely applicable to the claim set up by the Attorney-General in this case. The core of his claim is that the property in controversy is in possession of the officers of the Government as its agents under a "*claim* of title," and that, for that sole reason, no court has jurisdiction of the subject in controversy. He nowhere avers, except by implication, that this possession is lawful, or that this claim of title is valid. It goes, therefore, without saying that he interposes naked sovereign prerogative, or executive power, as a bar to the jurisdiction of the court, and a sufficient answer to the citizen who invokes the protection of the law. To sanction such a doctrine would give an unlimited extension to executive power by removing all restraints upon its exercise, not only by the Chief Magistrate, but by all the subordinate executive officers. Such a doctrine cannot be reconciled with a free Government, the fundamental principles of which look to the restraint of the power of its agents in dealing with the person and property of the citizen, and shelter both under the protection of law which no officer has the right to suspend or invade.

In the case of *Polack* vs. *Mansfield* (44 Cal., 36), which was an action of ejectment against an officer of the United States in possession under the orders of his superior, the consequences of the doctrine contended for by the Government here is forcibly stated. After conceding the general rule to be that the principal, and not the mere servant or employee, having no right of possession in himself, is the proper defendant, the court says:

> "But the rule which thus exempts the mere servant or employee of "another from an action, pre-supposes that the employer may be sued,

"and that the wrongs of which the plaintiff complains may be redressed "by resort to an action against the employer, as being the real party "committing the ouster. In a case, therefore, where the employer is, "for any reason, not amenable to an action, the rule referred to has no "application, and the employee, or servant, becomes *ex-necessitate* the "proper party defendant, since he is the only party who can be sub-"jected to suit at all. Were this otherwise, it would result that open "and admitted violation of private rights would find no redress in the "courts of the country. The Government of the United States, as such, "cannot be sued as a party defendant in the courts of the State; and "unless its servants and employees may be properly held responsible for "the lawless invasion of private property, committed by them under "the direction or command of the Government, the citizen is left wholly "without the protection which it is the first aim and purpose of the "municipal law to afford."

The same view was taken by the Supreme Court of Louisiana in *Dreux* v. *Kennedy* (12 Rob., 489).

IV

The case of *Osborn and others* v. *The Bank of the United States* (9 Wheat., 738), is too familiar to need comment, and yet it bears so directly and cogently on the question of jurisdiction that it should not be overlooked. This court held in that case:

1. That the bank, as a suitor, was to be treated as a private person.

2. That though the suit was virtually one against the State of Ohio, the controversy being one between the bank and the State, yet that fact did not oust the jurisdiction of the court, notwithstanding the 11th Amendment of the Federal Constitution exempted the State from suit at the instance of a private person.

3. That in all cases where jurisdiction depends on the character of a party, *it is the party to the record*, and not merely a party in interest.

4. That where officers of a State are sued, they must justify their official acts by some law, and when that justification fails the defense fails.

The difficulty with which the court had to struggle in that case did not arise out of the fact that Ohio, whose officers were defendants in a suit where her interests were directly involved, was a sovereign State, and therefore that her exemption from suit as such, under the general rule of law, extended to and exempted her officers from all suits in which her interests were directly involved; but it grew out of the fact that the 11th Amendment of the Federal Constitution had expressly exempted the State from suit by a private individual. It is apparent throughout the discussion, both by the court and counsel, that but for the prohibition contained in that amendment the jurisdiction against the officers of the State would have been unquestioned and unquestionable, without regard to the original constitutional provision which expressly made the States of the Union suable by private persons. Throwing out the provisions of the Federal Constitution touching in any manner the question of jurisdiction, while conceding that a sovereign State cannot be directly sued, the decision clearly affirms the doctrine that her officers are subject to suit for the recovery of property in their possession as the agents of the State. So far as the doctrine of the exemption of a sovereign State is concerned, Ohio would stand on precisely the same ground as that occupied by the United States. She was, and is, a sovereign, in this aspect of the question. She could not be directly sued, either at law or in equity. But this court said, in effect, that this circumstance should not oust the jurisdiction of the court in a suit brought against her officers for the express purpose of compelling them to yield up the possession of property which they, as the avowed officers of the State, though acting on its behalf and by its sanction, had no legal right to retain. On this point the court, through MARSHALL, *C. J.* (p. 842, *et seq.*), says:

> "If the State of Ohio could have been made a party defendant, it "can scarcely be denied that this would be a strong case for an injunc-"tion. The objection is, that, as the real party cannot be brought "before the court, a suit cannot be sustained against the agents of that "party; and cases have been cited to show that a court of chancery "will not make a decree, unless all those who are substantially inter-"ested be made parties to the suit.
>
> "This is certainly true where it is in the power of the plaintiff to "make them parties; but if the person who is the real principal, the "person who is the true source of the mischief, by whose power, and

“ for whose advantage, it is done, *be himself above the law, be exempt*
“ *from all judicial process,* it would be subversive of the best established
“ principles to say that the laws could not afford the same remedies
“ against the agent employed in doing the wrong which they would
“ afford against him, could his principal be joined in the suit. It is
“ admitted that the privilege of the principal is not communicated to the
“ agent; for the appellant's knowledge that an action at law would be
“ against the agent, in which full compensation ought to be made for
“ the injury. It being admitted, then, that the agent is not privileged
“ by his connection with his principal that he is responsible for his own
“ act, to the full extent of the injury, why should not the preventive
“ power of the court also be applied to him? Why may it not restrain
“ him from the commission of a wrong, which it would punish him for
“ committing? We put out of view the character of the principal
“ as a sovereign State, because that is made a distinct point, and
“ consider the question singly as respects the want of parties. Now,
“ if the party before the court would be responsible for the whole
“ injury, why may he not be restrained from its commission, if no
“ other party can be brought before the court? The appellants
“ found their distinction on the legal principle, that all trespasses
“ are several as well as joint, without enquiry into the validity of
“ this reason, if true. We ask if it be true? Will it be said that
“ the action of trespass is the only remedy given for this injury?
“ Can it be denied that an action on the case, for money had and
“ received to the plaintiff's use, might be maintained? We think
“ it cannot, and if such an action might be maintained, no plausable
“ reason suggests itself to us, for the opinion that an injunction may
“ not be awarded to restrain the agent, with as much propriety as it
“ might be awarded to restrain the principal, could the principal be
“ made a party.

“ We think the reason for an injunction is much sronger in the actual
“ than it would be in the supposed case. In the regular course of things,
“ the agent would pay over the money immediately to his principal, and
“ would thus place it beyond the reach of the injured party, since his
“ principal is not amenable to the law. The remedy for the injury would
“ be against the agent only, and what agent could make compensation for
“ such an injury? The remedy would have nothing real in it. It would
“ be a remedy in name only, not in substance.”

In the case of *Davis* vs. *Gray* (16 Wall., 204), a similar question arose on demurrer to the bill in equity; the first ground of demurrer being:

“Because it did not appear from it (the bill), that the defendants, or either of them, had any direct or personal interest in the lands which were the subject matter of the suit; but, on the contrary, that they were sued in their official capacities only ; and that the lands were a part of the public domain of the State of Texas, which was not, and could not be made a party to this suit."

In disposing of this point, this court said :

"A few remarks will be sufficient to dispose of the jurisdictional ob- " jections as to the appellants.

" *In Osborn* v. *The Bank of the United States* (9 Wheaton, 738), three " things, among others, were decided.

"(1.) A Circuit Court of the United States, in a proper case in equity, " may enjoin a State officer from executing a State law in conflict with " the Constitution or a statute of the United States, when such execution " will violate the rights of the complainant.

" (2.) Where the State is concerned, the State should be made a party, " if it could be done. That it cannot be done, is a sufficient reason for " the omission to do it, and the court may proceed to decree against the " officers of the State in all respects as if the State were a party to the " record.

" (3.) In deciding who are parties to the suit, the court will not look " beyond the record. Making a State officer a party does not make the " State a party, *although her law may have prompted his action, and* " *the State may stand behind him as a real party in interest.* A State " can be made a party only by shaping the bill expressly with that view, " as where individuals or corporations are intended to be put in that re- " lation to the case.

" Dodge *vs.* Woolsey, (18 How., 331) : The State Bank of Ohio *v.* " Knoop (16 *id.*, 369) ; The Jefferson Branch Bank *v.* Skelly (1 Black, " 436) ; Ohio Life and Trust Company *v.* Debolt (16 How., 432) ; and the " Mechanics and Traders' Bank *v.* Debolt (18 *id.*, 380), proceeded upon " the same principles and were controlled by that authority, with respect " to the jurisdictional question arising in each of those cases as to the " defendant."

In Board of Liquidation v. *Macomb* (92 U. S., p. 541), MR. JUSTICE BRADLEY, in delivering the opinipn of this court, when speaking of the claim that officers of a State are not amenable to legal process, said :

"On this branch of the subject the numerous and well-considered " cases heretofore decided by this court leave little to be said. The " objections to proceeding against State officers by *mandamus* or injunc- " tions are : first, that it is, in effect, proceeding against the State " itself, and, secondly, that it interferes with the official discretion " vested in the officers. It is conceded that neither of these things can " be done. A State, without its consent, cannot be sued by an indi- " vidual ; and a court cannot substitute its own discretion for that of "executive officers in matters belonging to the proper jurisdiction of the "latter, But it has been well settled that, when a plain official duty, "requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such "refusal may have a *mandamus* to compel its performance, and when "such duty is threatened to be violated by some positive official act, any "person who will sustain personal injury thereby, for which adequate "compensation cannot be had at law, may have an injunction to prevent "it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case if the officer plead the "authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. *An unconstitutional* law will be treated by the courts as null and void. *Osborn* "v. *Bank of the United States*, 9 *Wheat.*, 859; *Davis* v. *Gray*, 16 *Wall.*, "220."

It is difficult to conceive why an illegal act of an individual should not be treated by this court as void, as well as an unconstitutional law of the legislature of a State.

See also *Hancock* v. *Walsh* (3 Woods, 351).

The notion that public officers or agents who are created and governed by law could shut out all judicial inquiry into the character of their acts by invoking the mystic, but omnipotent power of sovereign prerogative, and interposing that between them and their victims, had not, at that period, taken root or even germinated.

It is due to the character of the illustrious jurists and lawyers who took part in most of the cases which I have cited, and to the age in which they lived, to say that the atmosphere in which their lives had been spent was not one in which this idea of soveriegn prerogative could sprout and grow to the portentious dimensions now claimed for it. Some of them had periled their lives and estates to found a government which would secure the person and property of the citizen against arbitrary power, and the rest had been cradled and nursed by the spirit which rejects its yoke.

And disguise this question as we may, robe it in any drapery of official and professional language we may select, the doctrine contended for by the Attorney-General here is a plea for the extension of executive and the contraction of judicial power, by exempting executive acts from judicial scrutiny where those acts touch the property of a private citizen. Such a doctrine is in deadly hostility to the declared object of the Federal Constitution to "establish justice * * * and secure the blessings of liberty" to the people of the United States and their posterity. It is a doctrine in conflict with the fundamental principles of liberty; and the whole literature which records the struggles of peoples against the domination of arbitrary executive power, glows with the spirit which repudiates it with scorn. I content myself with a single citation, the sentiments of which, though they were aimed at the display of executive power on a different field, are applicable to the still more perilous one on which the Attorney-General has entered here:

> "The contest for ages has been to rescue liberty from the grasp of "executive power. Whoever has engaged in her sacred cause, from the "days of the downfall of those great aristocracies which had stood be-"tween the king and the people to the time of our own independence, "has struggled for the accomplishment of that single object. On the "long list of the champions of human freedom there is not one name "dimmed by the reproach of advocating the extension of executive "authority; on the contrary, the uniform and steady purpose of all "such champions has been to limit and restrain it. To this end, the "spirit of liberty, growing more and more enlightened and more and "more vigorous from age to age, has been battering for centuries against "the solid butments of the feudal system. To this end, all that could "be gained from the imprudence, snatched from the weakness, or "wrung from the necessities of crowned heads, has been carefully "gathered up, secured and hoarded, as the rich treasures, the very "jewels of liberty. To his end, popular and representative right has "kept up its warfare against prerogative, with various success; some-"times writing the history of a whole age in blood, sometimes witnessing "the martyrdom of Sidneys and Russells, often baffled and repulsed, "but still gaining, on the whole, and holding what it gained with a grasp "which nothing but the complete extinction of its own being could "compel it to relinquish. At length the great conquest over executive "power in the leading western States of Europe has been accomplished. "The feudal system, like other stupendous fabrics of past ages, is known "only by the rubbish which it has left behind it. Crowned heads have "been compelled to submit to the restraints of law, and the *people*, with "that intelligence and that spirit which make their voice resistless, have "been able to say to prerogative: 'Thus far shalt thou come, and no "'farther.' I need hardly say, sir, that into the full enjoyment of all "which Europe has reached, only through such slow and painful "steps, we sprang at once, by the Declaration of Independence, and by

> " the establishment of free representative governments ; governments " borrowing more or less from the models of other free states, but " strengthened, secured, improved in their symmetry, and deepened in " their foundation, by those great men of our own country whose names " will be as familiar to future times as if they were written on the arch " of the sky.
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> " Through all this history of the contest for liberty, executive power " has been regarded as a lion which must be caged."—(Webster's Works, vol. 4, pp. 133, 134.

As already stated, these impressive utterances were addressed to a different class of executive encroachments from the one which we are now seeking to resist, but they were less insidious and far-reaching than the doctrine that the executive agents of the Government can, at will, appropriate the property of the citizen, and then shelter their acts from scrutiny and redress by invoking the impenetrable shield of sovereign prerogative. This new departure, in giving license and immunity to executive agents in the exercise of irresponsible power over the propertyof the citizen, comes home to the very hearthstone of every family in the country.

The recent case of the *Fidelity* (16 Blatch. C. C., 567) shows how far reaching is the principle, when once established, that *title* to property in actual use as an instrumentality of the Government cannot be enquired into judicially. That case holds, in accordance with principle and precedent, that a City Government, so far as it is locally entrusted with a share in the Government, is equally with the General and State Governments at liberty to avail itself of this exemption growing out of its sovereign character from interference with its instrumentalities of Government in actual use as such, and that property to which *its title is questioned* cannot be taken from its possession, or the possession of its officers, by the ordinary process of law. But if the principle contended for by the United States in this case is sustained, then, if a city or town government succeeds by fraud or force in possessing itself of a vessel, or of land belonging to a citizen, and is in the actual occupation thereof, and using it for the public purposes of the city, as in the case of the *Fidelity*, for transporting coal to its almshouses, or in a case of real estate, for a Court House or City Hall, then no suit of replevin or of ejectment will lie to where those acts touch the property of a private citizen. Such a doctrine is in deadly hostility to the declared object of the Federal Constitution to "establish justice * * * and secure the blessings of liberty" to the people of the United States and their posterity. It is a doctrine in conflict with the fundamental principles of liberty; and the whole literature which records the struggles of peoples against the domination of arbitrary executive power, glows with the spirit which repudiates it with scorn. I content myself with a single citation, the sentiments of which, though they were aimed at the display of executive power on a different field, are applicable to the still more perilous one on which the Attorney-General has entered here:

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But, we submit, that something more is necessary than the mere manual possession of property and its use "as an instrumentality of government" to constitute it "public property.' The *title* must be vested in the Government, sovereign or municipal, in order to place it beyond the reach of judicial jurisdiction. Otherwise the agents of any municipal corporation might seize or detain the property of the private citizen, impress it into the public service, and then invoke the prerogative of government as a bar to all inquiry, and to all efforts to repossess himself of that to which he has a clear right and title. It does no violence to the subject to say that property so illegally taken or detained is not *public property*, but is public *plunder*.

We are aware of the language of this court in the case of *Carr* v. *The United States* (98 *U. S.*, 433). In delivering the opinion, Mr. Justice Bradley says:

> "We consider it to be a fundamental principle that the Government " cannot be sued except by its own consent; and certainly no State can " pass a law, which would have any validity, for making the Govern- " ment suable in its courts. It is conceded in *The Siren* (7 Wall., 152) " and in *The Davis* (10 *Id.*, 15), that without an Act of Congress no " direct proceeding can be instituted against the Government or its " property. And in the latter case it is justly observed that 'the pos- " 'session of the Government can only exist through its officers using " 'that phrase in the sense of any person charged on behalf of the Gov- " 'ernment with the control of the property, coupled with actual pos- " 'session.' If a proceeding would lie against the officers as individ- " uals in the case of a marine hospital, it might be instituted with equal " facility and right in reference to a post-office, or a custom house, a " prison, or a fortification.
>
> "In some cases (perhaps it was so in the present case), it might not be " apparent until after suit brought that the possession attempted to be

"assailed was that of the Government; but when this is made apparent "by the pleadings or the proofs, the jurisdiction of the court ought to "cease. Otherwise the Government could always be compelled to come "into court and litigate with private parties in defense of its property."

It is extremely unpalatable for me at any time, and especially now, to even seem to criticise adversely any utterance of this tribunal; but, thank Heaven, the judicial department of the Government of the United States does not invoke any imperial or sovereign prerogative to place the grounds of its judgments beyond the pale of rational and decorous examination. I shall, therefore, with leave of the court, submit some brief observations on the passages which I have cited from the case of *Carr* v. *The United States.*

In the first place, the cases of the *Siren* and the *Davis*, which constitute the premises from which the somewhat expanded conclusions stated in the opinion are drawn, were both limited, in their essential features, to a narrow range. In neither case was any question of title raised between the suitor and the Government. In both (as in *Briggs* v. *The Light Boats*, to which both refer with approval) the title of the property sought to be reached was conceded and averred to be in the Government. In the case of the *Siren*, had she not been sold and the proceeds of her sale been placed by the United States *in gremio legis*, and, therefore, under the control of the court, she would have been in the absolute possession of the Government, under a title which the court pronounced perfect. In the case of the *Davis*, but for the circumstance that the cotton had been shipped by the United States by a private carrier as common cargo, the Government would have been in possession by an undisputed title. In both cases, I repeat, the title was perfect in the United States, and possession would have been equally perfect but for the circumstances to which I have referred, and the observations of the court in both cases affirming the exemption of property from coercive judicial process, were aimed solely, and as authority, necessarily confined, to property in which both valid title and rightful possession inhered in the Government. The court might well say that a private suitor could not invoke the process of the court to take from the Government its own property for the purpose of enforcing the collection from it the proceeds of a lien which rested on it.

This lien was in the nature of a debt for damages due on the property, and was subordinate to the paramount title of the Government, and a seizure of the property for the purpose of enforcing the payment of the debt would have savored of a direct suit against the United States.

In the case of *Briggs* v. *The Light Boats*, both title and possession were in the Government. That case has evidently not been without its influence here. The opinion was enriched by great learning, but perhaps some unwarrantable inferences have been drawn from it.

In the next place, the court below found, in *Carr* v. *The United States*, that the title to the land in controversy was perfect in the United States by virtue of their succession to the rights of the Mexican Government in the premises, by lawful reservation for Government use by the United States, and by grant from the City of San Francisco to the United States, and this court affirmed that view. No allusion was made by the court below in its opinion (3 Sawyer, 477) to the question touched upon, in the passages I have cited, from the opinion of this court.

In the third place, I may be pardoned for saying that I shrink from the conclusion that this court intended, in the few brief observations which I have cited from the opinion in *Carr* v. *The United States*, to overrule the cases of *Meigs* v. *McClung*, *Wilcox* v. *Jackson*, *Brown* v. *Huger*, and *Grisar* v. *McDowell*, and that without so much as alluding to them, and to practically hold that in those cases this court rendered a series of important judgments on controversies which, in judgment of law, were not only *coram non judice*, but in direct conflict with a fundamental principle which forbade jurisdiction.

It is said, in *Carr* v. *The United States*, that wherever it is made apparent by the pleadings or the proofs that it is the possession of the Government that is assailed, "the jurisdiction of the court *ought* to cease" (and the possession of its officers is treated as the possession of the Government). I suppose, however, this is to be understood as asserting that in the event named, the jurisdiction of the court *does* actually cease; for jurisdiction is not a question of discretion, or degree; and the imperial power of prerogative is absolute and conclusive. It goes to the jurisdiction, and, as CHIEF JUSTICE MARSHALL, in speaking for the court, in *Osborn* v. *The Bank of the United States,* remarks, "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable" (9 Wheat., 847).

But, in the case we are considering, the consequences of allowing suits against the officers of the Government, where their authority over property through possession under claim of title is involved, are pointed out. It is said that, "If a proceeding would lie against the officers as individuals, in case of a marine hospital, it might be instituted with equal facility and right in reference to a post office or custom house, a prison or a fortification." And that, if jurisdiction does not cease on the discovery, "that the possession attempted to be assailed is that of the Government," the latter "could always be compelled to come into court and litigate with private parties in defense of its property."

Now, I respectfully ask, why should they not be compelled to do this very thing? The United States are a great landholder in all the States, generally outside of the public domain, taking title through purchase. They can take it in no other way, except by the exercise of the right of eminent domain. The Constitution forbids their depriving the citizen of his land without due process of law, or without compensation when "it is taken for public purposes." If their agents or officers disregard these provisions, and take his land or hold it from him without any legal justification, they act, not only without law, but in defiance of the plainest provisions of the organic law. Why are not their acts proper subjects of judicial inquiry, and, if wrong, proper subjects of judicial redress? All such controversies can and are brought within the exclusive jurisdiction of the Federal courts; and it can be safely asserted that during the ninety-two years in which these courts have administered the law between private citizens, and between them and the official representatives of the Government, the latter has suffered no injustice and practically no inconvenience. The questions which have arisen in these cases, and those which may hereafter arise in the purpose of enforcing the collection from it the proceeds of a lien which rested on it.

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Now, if this portentous doctrine of sovereign prerogative is to prevail and interpose an adamantine barrier between the citizen and the official agent and the property which the latter may unlawfully hold and retain, shutting out all judicial inquiry, *the citizen holds his property no longer under the protection of law, but at the will of the executive agents of the Government.*

I have not, and shall not, trouble myself by an examination of English authorities touching the prerogatives of the Crown, for the position of the United States, "as to prerogative, is anomalous, owing to our peculiar institutions."

GRIER, *J.*, in *Elliot* v. *Van Voorst*, 3 Wall., Jr., 302.

But I cannot forbear to cite in this connection some observations from the opinion of this court in the *Langford* vs. *United States* (101 U. S., 341), as they dispose of a suggestion made by the Solicitor-General on the argument of this case at the last term, to the effect that "the United States can do no wrong."

In disposing of a claim put forward on the argument, "that the maxim of the English constitutional law, that the King can do no wrong, is one which the courts must apply to the Government of the United States, and that, therefore, there can be no tort committed by the Government," this court said (p. 343):

> "We have no King to whom it can be applied. The President, in the "exercise of the executive functions, bears a nearer resemblance to the "limited monarch of the English Government than any other branch of "our Government, and is the only *individual* to whom it could possibly "have any relation. It cannot apply to him, because the Constitution "admits that he may do wrong, and has provided, by the proceeding of "impeachment, for his trial for wrongdoing, and his removal from office "if found guilty. None of the eminent counsel who defended President "Johnson on his impeachment trial asserted that by law he was incapa-

"ble of doing wrong, or that, if done, it could not, as in the case of the "King, be imputed to him, but must be laid to the charge of the ministers who advised him.

"It is to be observed that the English maxim does not declare that "the Government, or those who administer it, can do no wrong; for it is "a part of the principle itself that wrong may be done by the governing "power, for which the ministry for the time being is held responsible; "and the ministers, personally, like our President, may be impeached; "or, if the wrong amounts to a crime, they may be indicted and tried at "law for the offense.

"We do not understand that, either in reference to the Government of "the United States or of the several States, or of any of their officers, "the English maxim has an existence in this country."

In *James* v. *Campbell*, decided at the last term of this court, this question of jurisdiction over suits against officers, is referred to though not decided. It is, however, intimated that no suit would lie against an officer of the government for tort. That was the case of piracy of an invention by a postmaster. If this doctrine is to prevail, it is difficult to see why the property of citizens, real and personal, is not given up to sack and pillage by the whole army of office holders, now said to be 100,000 strong, and annually increasing. But if an injunction would lie against an officer of a State, to restrain him from doing an illegal act, acting under a law of a State, as was held by this court in *Board of Liquidation* v. *McComb* (92 U. S, 531, 541), it is difficult to see why an injunction would not be awarded against a Federal officer to restrain him from doing an act without the color of any law to excuse it.

V.

It was suggested during the progress of the argument of this cause at the last term, that this property having been taken for public use, or being in the use and possession of the officers of the Government avowedly on its behalf, it was the duty of Congress to make compensation, rather than that of the court to award restitution.

With all deference, it is submitted that this suggestion is no answer to the plaintiff's claim in this case.

Several things must precede or accompany the taking of private property for public use, in order to bar the right of the citizen to reclaim it.

First.—It must be taken by virtue of "due process of law." The property involved in this suit was never taken by virtue of any law, unless it be by the law of superior force in time of war. That occupation conferred no title on the Government. If it justified its possession during the period of hostilities, that justification terminates with the termination of hostilities. For nearly twenty years of peace it has been held simply by force.

Second.—No act of Congress authorized the taking. None has authorized its retention. But if a dozen acts of the Legislature had authorized the taking or detention of this property in time of peace, they would have been void unless they, or some other acts, had provided for compensation to the owner. Such a law would be in open and flagrant violation not only of an express prohibition in the Federal Constitution, but of what has been termed a "principle of universal law."

> "This power to take private property reaches back of all constitu-"tional provisions; and it seems to have been a settled principle of "universal law that the right to compensation is an incident to the "exercise of that power; that the one is inseparably connected with "the other; that they may be said to exist, not as separate and distinct "principles, but as parts of one and the same principle."

Sinnickson vs. *Johnson* (1 Harrison, N. J., 129).

Mr. Justice Story, in his Commentaries on the Constitution (§ 1790), in speaking of this provision prohibiting the taking of private property for public uses without compensation, says:

> "This is an affirmance of a great doctrine established by the common "law for the protection of private property. It is founded in natural "equity, and is laid down by jurists as a principle of universal law. "Indeed, in a free government almost all other rights would become "utterly worthless if the Government possessed an uncontrollable power "over the private fortune of every citizen. One of the fundamental

> "objects of every good government must be the due administration of "justice; and how vain it would be to speak of such an administration "when all property is subject to the will or caprice of the Legislature "and the rulers."

It was well said by Mr. Justice **Miller**, in delivering the opinion of this court in *Loan Association* vs. *Topeka* (20 Wall., 664):

> "To lay with one hand the power of the Government on the property "of the citizen, and with the other to bestow it upon favored individuals "to aid private enterprises and build up private fortunes, is none the "less a robbery because it is done under the forms of law and is called "taxation. This is not legislation. It is a decree under legislative "forms."

It requires no argument to show that Congress has no more power, in time of peace, to authorize the seizure of the property of the citizen and the appropriation of it to its own use, except by way of taxation, than it has to authorize its seizure and appropriation to the use of a private person, except where it provides that compensation be made to the owner. Here no such provision exists, and therefore the detention of this property is absolutely wrongful and illegal.

VI.

There are, in fact, two principles of law which bear upon this question of the exemption of the Government or its property from process of law. And it is important to keep them distinct, because they rest on different reasons, and are very different in their application. One is the rule exempting a sovereign from being sued without his own consent. This rule is absolute. The sovereign cannot be called into court. But the exemption is personal. It does not apply to a public officer, however high. The United States and the several States, as well as foreign sovereigns or governments, are within the rule. So far as the Constitution of the United

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> "objects of every good government must be the due administration of "justice; and how vain it would be to speak of such an administration "when all property is subject to the will or caprice of the Legislature "and the rulers."

It was well said by Mr. Justice MILLER, in delivering the opinion of this court in *Loan Association* vs. *Topeka* (20 Wall., 664):

> "To lay with one hand the power of the Government on the property "of the citizen, and with the other to bestow it upon favored individuals "to aid private enterprises and build up private fortunes, is none the "less a robbery because it is done under the forms of law and is called "taxation. This is not legislation. It is a decree under legislative "forms."

It requires no argument to show that Congress has no more power, in time of peace, to authorize the seizure of the property of the citizen and the appropriation of it to its own use, except by way of taxation, than it has to authorize its seizure and appropriation to the use of a private person, except where it provides that compensation be made to the owner. Here no such provision exists, and therefore the detention of this property is absolutely wrongful and illegal.

VI.

There are, in fact, two principles of law which bear upon this question of the exemption of the Government or its property from process of law. And it is important to keep them distinct, because they rest on different reasons, and are very different in their application. One is the rule exempting a sovereign from being sued without his own consent. This rule is absolute. The sovereign cannot be called into court. But the exemption is personal. It does not apply to a public officer, however high. The United States and the several States, as well as foreign sovereigns or governments, are within the rule. So far as the Constitution of the United

States gives jurisdiction to the Federal Courts in actions against a State, or acts of Congress authorize suits against the United States in the Court of Claims, the rule is modified or encroached upon; otherwise it remains unimpaired. But, as this court has frequently said, in the application of this rule, the record alone is to be considered in determining who is the party defendant. The reason of the rule appears to be the dignity and sovereign character of the party.

The other principle is based, not on the dignity or sovereignty of the party to the record or the party in interest, but wholly on reasons of public policy and public necessity, to prevent any unnecessary interference with the operations of Government. The principle is that property in actual use for governmental purposes is to some extent exempt from the process of law, mesne or final. The limit of this exemption is the point involved in this case, and will be presently considered. But the exemption, with such limits and qualifications as it is subject to, does not apply to the sovereign only, or to the United States, or the several States, and the property in its or their possession. It applies as well to property in the possession of a city or county, or town or village, all of which are liable to be sued and to be summoned into court upon all the ordinary processes of law.

What, then, are the limits of this principle of exemption of property in use for governmental purposes from process of law? It has been extended to attachment on mesne process and to service of an execution, both of which are means merely for securing or collecting a debt. It is believed that it has never been extended to the service of process, at any rate of final process, whose object is the recovery of specific property claimed in the suit adversely to the body corporate and politic sued or the officer or person in possession. In other words, it has never been extended to exempt property so used from the legal claim of its owner *to assert his title thereto by due process of law.* The distinction between the two classes of cases is obvious, and in its consequence on the rights and interests of the citizen involved in the exemption, is immense. It cannot be said that the citizen has an absolute right to have his debt satisfied out of particular property of the debtor, even if his debtor has no other means of satisfying it. Laws exempting certain kinds of property, as tools of trade, certain household goods, and in some cases the homestead, exist in most civilized countries. The question what shall be exempted, is one to be determined by the constituted law making power of the State in its discretion, and no legal wrong is wrought by the exercise of this power of exemption. And this applies to any class of property thus removed from the use of the creditor, not by the provisions of a positive statute, but by the principle adopted through judicial action alone, by universal consent, as a rule of public policy, like that now under consideration. No legal wrong is done, because the property is the property of the debtor, and not of the creditor, and it is against public policy that it shall become the creditor's for the satisfaction of his claim on the debtor. In the theory of the law it is better that his claim remain unpaid rather than that this particular transfer be made. The denial of the remedy is not in any sense a taking from the creditor of his property.

But as regards the other class of cases, if the exemption is allowed to prevent a suit to try the title or the service of process to put the true owner in possession of his own property, then there is obviously a violation of that cardinal principle of liberty and safeguard of the right of private property which is embodied in the Federal and the State Constitutions alike—that no one shall be deprived of his property without due process of law. In this class of cases it is not a question of satisfying a debt, but the question is, whether there is any means by which a person despoiled of his goods or his lands by a public officer, without right, can be restored to their possession. To deny the ordinary remedies by process of law is to adopt and legalize the wrong and effectually to deprive the citizen of his property without due process of law. Such an extension of the principle of exemption is inconsistent with this constitutional principle, and is not required by any overruling consideration of public policy or necessity.

In the construction and application of other constitutional guarantees for the protection of private rights this court has uniformly and most emphatically held that a denial of remedies to recover property or enforce rights is equivalent to the denial of the right, or to the wrongful taking of the property.

Thus, in relation to the provision forbidding the States to pass laws impairing the obligation of contracts, MR. CHIEF JUSTICE TANEY says, in *Bronson* v. *Kinzie* (1 How., 318):

"And it would be unjust to the memory of the distinguished men who "framed it, to suppose that it was designed to protect a mere barren "and abstract right, without any practical operation upon the business "of life. It was undoubtedly adopted as a part of the Constitution for "a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, "by placing them under the protection of the Constitution of the United "States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to "sanction a distinction between the right and the remedy, which would "render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result."

And in *Green* v. *Biddle* (8 Wheaton, 75), MR. JUSTICE WASHINGTON says:

"Nothing, in short, can be more clear, upon principles of law and "reason, than that a law which denies to the owner of land a remedy to "recover the possession of it, when withheld by any person, however "innocently he may have obtained it; or to recover the profits received "from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to dininish the "value and amount of the thing recovered, impairs his right to, and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy "afforded be qualified and restrained by conditions of any kind, the "right of the owner may indeed subsist, and be acknowledged, but it is "impaired and rendered insecure, according to the nature and extent of "such restrictions."

The analogy between these two constitutional inhibitions is complete. Both the United States and the States are now, since the 14th Amendment of the Constitution, forbidden to deprive any one of his property without due process of law. And to extend this exemption, founded only on reasons of public policy and convenience, to the denial of all remedy to recover property wrongfully taken, especially where it is so taken under color of Federal authority, would be, within the meaning of the language of the court above cited, "sanctioning a distinction between the right and the remedy, which would "render this provision illusive and nugatory—mere words of "form, affording no protection, and producing no practical result."

VII.

I have but few other suggestions to make on this question of jurisdiction raised by the motion of the Attorney-General in the court below, and brought here in the record. As I have already stated, the paper filed by the Attorney-General sets up possession in the Government under "claim of title." As to the possession, it is alleged to be in the United States "as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, &c., * * * and for the uses and purposes set forth in the certificate of sale" annexed to the motion paper. This certificate states that the tax commissioners bid off the property, under the direction of the President, "for Government use for war, military, charitable, and educational purposes."

It is difficult to see how the purposes to which the land was afterwards devoted could, under the circumstances, affect the character of the title, or claim of title, under which the United States took this land. There is no pretense that they took it by virtue of the right of eminent domain. They simply purchased it at a tax sale just as any private citizen might have done, and hold it alone in right of title so obtained.

No cession of jurisdiction over the premises has been obtained or sought for. The United States, therefore, in the purchase of this property, acted in the mere exercise of a corporate right, and not in the exercise of any of the attributes of a political sovereign.

Elliot v. *Van Worst,* 3 Wall., jr., 302.

Its possession is, therefore, that of a purchaser, and mere possession, whatever its character, is never allowed to prevail over one who holds a valid title.

This the Attorney-General impliedly concedes when, not resting on the mere possession for the purpose of ousting the jurisdiction of the court, he supplements his averment of possession by asserting that it is under claim of title.

This claim of title rests on the certificate of the tax commissioners, under whose administration the form of a sale was

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This claim of title rests on the certificate of the tax commissioners, under whose administration the form of a sale was gone through with. The character of this alleged muniment of title is well known to this court. Three times have such documents been pronounced void, and conveying no title whatever to the bidder at the sale. By a rule early adopted and uniformly acted upon by the commissioners, they refused to receive the tax unless tendered by the owners in person. This court has held that such certificates were void.

Bennett v. *Hunter*, 9 Wall., 326.
Tracy v. *Irwin*, 18 Wall., 549.
Atwood v. *Weems*, 99 U. S., 183.

VIII.

But it will be said that by the Act of Congress of June 7, 1862 (U. S. Statutes at Large, vol. 12, pp. 422-426), as amended by the Act of February 6, 1863 (*id.*, pp. 640, 641), this certificate is made *prima facie* evidence of the regularity and validity of the sale, and of the title of the purchaser, except where the fact may be established that—

1. The property was not subject to taxes; or, 2. That the taxes had been paid previous to the sale; or, 3. That the property had been redeemed according to the provisions of the act. The ground on which the certificate was attacked in the court below was that what was done was equivalent in judgment of law to payment previous to the sale under the rule established by this court in the cases last cited.

This also relates to the question whether there was any error in the ruling of the court below in taking jurisdiction, and thus admitting such proof to affect the otherwise *prima facie* title of the United States. Conceding for the moment that in ordinary cases where the United States claim land by virtue of possession under a claim of title by purchase, the plea of sovereign prerogative is a bar to the jurisdiction, can that doctrine be applied to the case of a sale under this statute?

The land was bid off under this statute. The order of the

President directing the purchase and recited in the certificate, rests for its validity on this statute. The acts of the commissioners in selling and bidding in the property were confirmed by the statute alone. The whole proceeding depends for its legality on this Act of Congress. The very statute which confers the power to sell and purchase, provides that the certificate shall always be open to attack on the three points named.

Now, it was held in the case of *Cooley* v. *O'Connor*, already cited, that the act contemplated the execution and delivery of a certificate of sale to the United States when the latter were the purchasers, precisely the same as if the purchase were made by a private individual. As no exception is made in favor of the United States as to the right of the original owner to show that the tax had been paid and thus avoid the certificate, is it not within the fair scope of the rule of liberal construction to infer that Congress intended to allow these certificates to be attacked in all cases where the facts referred to in the act itself could be established? The spirit of this suggestion is supported by the remarks of this court in the case of the *Davis*, in which the opinion says:

> "In the English courts, when it is made to appear that property of "the Government ought, in justice, to contribute to a general average, "or to salvage, it seems to be the usual course of proceeding for the "proper officer of the Government to consent in court that it may take "jurisdiction of the matter. This consent is given by the authority of "the King, who thus submits to be sued in his own courts. The "liberal exercise of this authority removes the difficulty presented here, "where no power to do this exists in any officer of the Government, "and prevents any apprehension of gross injustice in such cases in "England.
>
> "We are, therefore, compelled to inquire into the special circum-"stances of this case to ascertain whether the cotton, which was the "subject of salvage, can be brought within the jurisdiction of the court "without violating the principle we have stated. In doing this, the "absence of any such power to submit the case to the jurisdiction of "the court, as that exercised in England, seems to justify a liberal con-"struction of the rule on which we are to act, in favor of the promotion "of justice."

And the judgment of this court in *Cooley* v. *O'Connor*, the defense of which was assumed by the United States, clearly proceeded on the idea that a certificate of sale under this statute, issued to the United States as the purchaser, was open to precisely the same inquiry as one issued to a private person. The unanimous opinion of the court was delivered by MR. JUSTICE STRONG, and he first deals with the ruling of the court below touching the certificate, as follows:

> "When the certificate of sale was given in evidence by the defendants "below, the Circuit Court ruled it to be void, because it was signed by "only two commissioners, and this decision of the court is now assigned "for error. It is obvious that the ruling was hurtful to the defendants. "Had the certificate been admitted, it would, by force of the statute, "have amounted to *prima facie* evidence, as well of the regularity and "validity of the sale as of the title of the purchasers. It would, there"fore, have cast upon the plaintiff the burden of showing affirmatively "that the sale was irregular and invalid, and that the title was not in the "United States."

(See also *De Treville* v. *Smalls*, 98 *U. S.*, 517.)

This language is consistent with no other view than that the certificate of sale to the United States stands upon no higher or different ground than one purporting to convey the premises to a private party. And this was the just and rational conclusion; for it is incredible that Congress should have intended that, under this statute, which applied to the property of all citizens, and under which the United States could have purchased every foot of land sold, the title, when nominally vested in the United States by virtue of a tax certificate, should be placed forever beyond the reach of judicial inquiry.

WM. D. SHIPMAN,
Of Counsel for Defendant in Error.

16-196

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Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES,
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AND

FREDERICK KAUFMAN AND
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BRIEF OF WILLIAM J. ROBERTSON, OF COUNSEL FOR DEFENDANT IN ERROR ON RE-ARGUMENT.

Judd & Detweiler, Printers.

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BRIEF OF WILLIAM J. ROBERTSON, OF COUNSEL FOR DEFENDANT IN ERROR ON RE-ARGUMENT.

This was an action of ejectment brought by the defendant in error, in the circuit court of Alexandria county, Virginia, against persons in the actual occupation of a tract of land called Arlington, situate in said county.

Two petitions of the defendants for the removal of the suit from the State court into the circuit court of the United States for the eastern district of Virginia were filed, the first setting forth that said suit was commenced and prosecuted for and on account of a right and title to the lands in the declaration mentioned, set up and claimed by the defendants "under the revenue laws of the United

States; that is to say., under a certain law thereof entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' Approved June 7, 1862, and the several amendments thereto."

The second setting forth that the defendants did not claim title to said land, or interest therein, except that about two hundred acres thereof were in charge of the War Department of the United States and used as a National Cemetery, of which the defendant Kaufman was superintendent, under directions of the War Department—the remaining portion of the premises being set apart as a military post and reserve connected therewith, and in charge of the defendant Strong, who, as an officer of the United States, was occupying the same under orders of the War Department; and that the defendants other than said Kaufman and Strong, who were upon the premises, were occupying the same "not as tenants, but under permission of the officers in charge of said military reservation." That the United States became the purchaser of said land at a tax sale made under the act of Congress of June 7, 1862, and claimed title and the right of possession thereof under and by virtue of a certificate of sale made to them by the commissioners of taxes under said act, and the amendments thereto; which title the defendants set up and claimed as a defense to the action.

After the suit had, upon said petitions, been removed to the circuit court of the United States, and the record and proceedings of the State court filed therein, the Attorney General of the United States appeared and filed a suggestion, setting forth that the property in controversy in the cause was, and had been for more than ten years, in the use and possession of the United States under claim of title of record; filing with the suggestion a copy of the tax sale certificate, and declaring that he did not submit the rights of the Government to the court, and that he appeared only for the purpose of the motion, he moved that the declaration in said suit be set aside and all the proceedings be stayed and dismissed.

The defendant in error demurred to this suggestion, and his demurrer was sustained, and the motion of the Attorney General was overruled by the court. Subsequently the case was tried before a jury, and verdict and judgment rendered in favor of the defendant in error, against Kauffman and Strong, for the possession of the premises in the declaration mentioned, with the exception of a small portion thereof, occupied by one Maria Syphax—the defendant in error having taken a non-suit as to all of the defendants in the original suit except the said Kauffman and Strong. The case was defended by the United States District Attorney, and by special counsel employed by the Government for the purpose. In the progress of the trial numerous exceptions were taken to the rulings of the court—among others, to the refusal of the court to instruct the jury that they must find for the defendants if they believed, from the evidence, that the property in controversy, or any definite portion thereof, was in the possession of the United States, through some of its officers or agents, charged on behalf of the United States, with the control of the property, coupled with its actual possession, at and before and since the commencement of the suit; and that the said property had been bought by the United States at the tax sale, and was held by them under the tax certificate referred to in the suggestion of the Attorney General, and that the defendants made no claim of right to the occupation of the property except under the authority, and by virtue of the orders, of the War Department of the United States.

A motion for a new trial having been made and overruled, a bill of exceptions to the rulings of the court adverse to the defendants Kauffman and Strong, was prayed for and allowed them.

From this judgment two writs of error have been sued out—one by the United States, the other by the defendants Kauffman and Strong. Only one transcript of the record has been filed.

Upon this record the first question, and by far the most important one that arises, is whether the court erred in refusing to dismiss the suit, and in proceeding to verdict and judgment, in spite of the objection made by the Attorney General of the United States, and of the same objection made by the defendants Kauffman and Strong in praying for the instruction above referred to.

It is, in the first place, to be observed that, by the Virginia statute under which this action was brought, (Code of Virginia, chapter 131,) the action of ejectment is given not only in lieu of the action of ejectment at common law, but also of the writ of right. No entry, either actual or fictitious, is now necessary for its maintenance, so that this case is free from the objection that in bringing it there was any dispossession of the Government, actual or constructive, or any intrusion upon the land claimed or held by it. The possession of the Government, by its officers and agents, has not, up to the present time, been, in any manner, intruded upon or disturbed.

This case, therefore, does not belong to the class of which Briggs *vs.* The Light Boats, 11 Allen, 157, is an instance; but does belong to that illustrated by The Davis, 10 Wallace, 15, which shows that there is no objection to the maintenance of a suit by which the interest of the Government may be affected, provided only the actual possession of the Government, through its officers or agents, is not disturbed or invaded by the institution of the proceedings designed to inquire into the validity of the title claimed by it.

See what is said by Jervis, chief justice, in Taylor *vs.* Best, 14 Com. Bench Rep., 521–523, as to the distinction between suits which can be brought without serving process upon the sovereign personally, or disturbing his possession, and those in which it is necessary to do so in order to institute the suit.

It is, in the next place, to be observed that the claim of the United States to Arlington arises from a purchase made at a sale for taxes. The title to it was not acquired by the exercise of the sovereign power of the Government in the way of condemnation or forfeiture; and the consent of the State of Virginia has never been obtained, so as to invest the United States with jurisdiction over it. The validity of the title thus acquired stands on the same ground with that of an individual purchasing at a tax sale, and should be tested by the same rules.

As was said by Judge Story, in United States *vs.* Cornell, 2 Mason's Reports, p. 63:

> "Although the United States may well purchase and hold lands for public purposes, within the territorial limits of a State, this does not of itself oust the jurisdiction or sovereignty of such State over the land so purchased. It remains until the State has relinquished its authority over the land either expressly or by necessary implication."

In Commonwealth *vs.* Young, Brightly's Rep., 302, it was held that—

> "The Constitution of the United States prescribes the only mode by which they can acquire land as a sovereign power, and, therefore, they hold only as an individual when they obtain it in any other."

To the same effect is the decision in the case of The People *vs.* Godfrey, 17 Johns. Rep., 225.

It is well settled that the Government, by becoming a member in, or owner of, a trading company, divests itself, so far as concerns the transactions of that company, of its sovereign character, and waives the privileges of a sovereign. Accordingly, the objection that a corporation, of whose stock the State was sole proprietor, was not liable to suit, because it was virtually a suit against the State itself, was overruled.

See Bank of the United States *vs.* Planter's Bank, 9 Wheat., 904; Bank of the Commonwealth of Kentucky *vs.* Wister and others, 2 Peters, 318; Briscoe *vs.* Bank of the Commonwealth of Kentucky, 11 Peters, 257.

See also Elliott *vs.* Van Vorst, 3 Wallace, Jr., in which Mr. Justice Grier says, p. 302:

> "In the mere exercise of a corporate right, the Government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to Congress to redeem. The courts of New Jersey cannot be thus ousted of their jurisdiction and duty to assist the mortgagee to have his mortgage satisfied, and the mortgaged premises sold for that purpose. When the Government in the exercise of the rights and functions of a civil corporation purchases lands to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. Thus, when the Government of the United States became a partner in a trading corporation, such as the United States Bank, it divested itself, so far as it concerned the transactions of that company, of its sovereign character and took that of a citizen; consequently its property and interests were subject to the decrees and judgments of courts, equally with that of its co-partners."

Jurisdiction over land seems to be inseparable from the idea of its ownership with the prerogative of a sovereign. The fact that the United States have failed to acquire jurisdiction over the land in controversy, shows conclusively that they have elected to hold it as a corporation or individual would hold it, and not in their sovereign character; that, as to it, they have waived the privileges of sovereignty.

But it is argued that, although this may be true, the plaintiff cannot test the validity of the title claimed against him by the Government, because the Government cannot be sued, except with its consent; which in this case has not been given, and because a suit against the agents or officers of the Government is in effect a suit against the Government itself.

It is conceded that, without their consent, no direct suit can be maintained against the United States. But if it can be established that there is no mode by which an individual can require judicial inquiry to be made as to the validity of a claim to his property asserted by the United States, it will be demonstrated that the citizens of a country which boasts of its free institutions, and of the protection against oppression secured to the humblest individual within its limits, have absolutely NO RIGHTS OF PROPERTY as against the Government. For, in the case supposed, the Government may, at its pleasure, seize upon and appropriate to its own use the property of any citizen, and deny him the privilege of having judicial inquiry made into the legality of the act, leaving him no redress, except what Judge Grier has (as the experience of the plaintiff in reference to this very property shows) well designated "the hopeless remedy of a petition to Congress."

If this be the law, we have, indeed, cause to lament that we are not still subject to the jurisdiction, and entitled to claim the benefit of the laws of England, where "the judiciary is clothed with ample powers to give redress to the humblest subject, in a matter of private contract or property against the Crown."

Story on the Constitution, p. 1678.

The English cases relied on to show that an action like this could not be maintained in that country, so far from indicating that a party there occupying the position of the plaintiff in this case would not be entitled to have his rights made the subject of judicial investigation, show just the contrary. In every case in which it has been held that the suit could not be maintained, it was because an improper form of action, or an inappropriate court, had been resorted to—relief being denied on the express ground that an ample remedy was afforded by a petition of right.

Thus, in the case of *Doe* d. *Leigh* vs. *Roe*, 8 Mees. and Wels., 579, it will be seen that the Attorney General and the Solicitor General in their argument on behalf of the Crown, say:

> "The lessor of the plaintiff is not without a remedy, if he really have any title: he may proceed by petition of right."

And the same view was taken by the court.

Baron Alderson says:

> "The lessor of the plaintiff may proceed by petition of right."

Broom, in his Constitutional law, p. 241, says:

> "The Crown submits, as is abundantly proved by the cases already cited, to have its prerogatives openly discussed and investigated in courts of justice, and allows a remedy against itself for any infringement of the subject's right, provided such remedy be sought for where it can be had. The constitution of England, as remarked by Lord Holt, "has wisely distributed to several courts the determination of proper causes; but has left no subject in any case where he is injured, without his adequate remedy, if he will go to the right place for it; if a man will seek for a remedy at common law for a legacy, it is his own fault if he do not recover, as it would be if he should begin a suit for land in the court of admiralty, or go for equity to the common pleas." And so if the subject has cause of complaint against the Crown, he must proceed for redress by that pathway which the constitution has laid out for him. For an illegal invasion of his liberty he should proceed by *habeas corpus;* to obtain the revocation of a grant which injuriously affects him, he should proceed by *scire facias;* for an illegal invasion of the right of property, he should proceed by petition of right—speaking of which latter remedy Sir W. Blackstone tells us that the law has thus

furnished the subject with a "decent and respectful" mode of informing the King of a grievance, and soliciting redress. This mode of procedure is appropriate for inducing restitution by the Crown of land, or chattel property, of which it has, through misinformation or inadvertence, wrongfully possessed itself."

Relief upon a petition of right is not given as a matter of grace merely. It is a matter of grace in form only. The English subject has the same *right* to this remedy that he has to any other remedy given by law. It is "*a matter of constitutional duty*" to make the indorsement on the petition, "let right be done to the party;" and after that indorsement is made, the suit proceeds "as between subject and subject."

See 3 Black. Comm., 256; Story on the Constitution, section 1678, and what is said by Wilson J. in Chisholm *vs.* Georgia, 2 Dallas, 460, and the adjudications of this Court in United States *vs.* O'Keefe, 11 Wall., 178; and Carlisle *vs.* The United States, 16 Wall., 147.

In the United States the remedy by petition of right is unknown; and unless the citizen can bring an action of ejectment, he has no means of subjecting to judicial investigation the validity of the claim against him when the Government is in adverse possession of his land.

The objection that an action of ejectment cannot be maintained in such case, because the court has no power to enforce its process against the Government, is specious merely. A proper respect for the Government forbids us to suppose that when its own judicial tribunals have decided that it has in its possession the property of one of its citizens to which it is not entitled, it will continue to withhold that property from him unless compelled by coercive process to loosen its grasp.

In reply to a similar objection in Chisholm *vs.* Georgia, 2 Dallas, 451, Blair, J. says:

> "Nor does the jurisdiction of this court in relation to a State seem to me to be questionable on the ground that Congress has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual." * * * * "Is it altogether a vain expectation that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States, though not conformable to its own ideas of justice?"

However this may be, the court has no right, where it has jurisdiction over the parties to the record, to decline to exercise that jurisdiction, because it is *possible* that the enforcement of its judgment will be interfered with and prevented, by a power over which it can exercise no control. It is the duty of the court (as was said by Judge Blair in the case above referred to) to "go as far as it can." It is not for it to anticipate that the Government will so intervene so as to cause a failure of justice. But if it could so anticipate, it would not be excused for abdicating its own functions, in order to avoid throwing the responsibility for such failure where it ought to rest.

In the case at bar, Kauffman and Strong are subject to the jurisdiction of the court, and there can be no reason why judgment should not be rendered against them. It matters not that they may be agents or officers of the Government. Judge Story, in his Commentaries on the Constitution, sec. 1677, says:

> "In regard to property, the remedy for injuries" (done by the United States Government) "lies against the immediate perpetrators, who may be sued, and cannot shelter themselves, under any imagined immunity of the Government, from due responsibility. If, therefore, any agent of the Government shall unjustly invade the property of a citizen under color of public authority, he must, like every other violator of the laws, respond in damages. Cases, indeed, may occur in which he may not always have an adequate redress without some legislation by Congress: as, for example, in places ceded to the United States, and over

> which they have an exclusive jurisdiction, if his real estate is taken without, or against, lawful authority. Here he must rely on the justice of Congress, or of the executive department."

It will be observed that the learned commentator does not express an opinion that there is any class of cases in which the injured party cannot obtain redress, without legislation by Congress; but only that there are some cases in which, without such legislation, his redress will not be "*adequate;*" and it will be further observed that, in the example given by him, he confines these cases, so far as they relate to real estate taken without or against lawful authority, to those in which the United States have "an exclusive jurisdiction over the land in question." The ground of the distinction being that the exercise of *jurisdiction* over the place in controversy, may, in the nature of things, interfere with the party's obtaining, without some legislative act, that full and complete redress to which he may be entitled.

This difficulty does not exist in the case at bar; for, as has already been shown, the Government has acquired no jurisdiction over the land in controversy; and, if entitled at all, is entitled as a proprietor merely.

Chief Justice Marshall, in delivering the unanimous opinion of the court in the case of Cohens *vs.* Virginia, 6 Wheaton, p. 403, says:

> "We are also asked, if a State should confiscate property secured by a treaty, whether the individual could maintain an action for that property?
>
> "If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a State, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land, for that which the treaty secures to him; not against the State for money which is not secured to him."

As was clearly shown by Mr. Justice Hunt, in Rees *vs.* City of Watertown, 19 Wall., 124, the want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct—the inability to obtain its fruits, from whatever cause such inability may arise, not indicating that the remedy is not, in law, "full, adequate, and complete."

All the defendant is error asks in this case is that the judgment which has been rendered establishing his *right* to the property shall be affirmed. It will be time enough to inquire hereafter how far the courts can go in securing to him the enjoyment of that right.

It may be said that the Government, being no party to the suit, will not be bound by the decision against its officers or agents, and will therefore feel under no obligation to obey the judgment which has been rendered against them.

It is true that the Government, not being itself a party to the record, will not be technically bound by a judgment against its officers or agents, and will not be estopped from claiming against it; as was decided in the case of Carr *vs.* The United States, 98 U. S., 433.

But where the Government has notice of the suit against its officers or agents, and has full opportunity to defend it in their name, of which opportunity it avails itself, it seems that the *moral* obligation to obey would be as strong as if it had been itself a party; unless, indeed, as was the case in Carr *vs.* The United States, it has good reason to believe that a reinvestigation would lead to a different result, and show that such judgment ought not to have been rendered. In that event the Government, by itself becoming an actor, can re-litigate the question, without being prejudiced by the judgment rendered against its officer or agent.

The effect, therefore, of allowing suits like this to be maintained against the officers or agents of the Government, where the Government itself does not become a party, is merely to enable a citizen claiming adversely to the Government to have judicial inquiry made into the validity of his claim. When that inquiry has been duly made, and has resulted in his favor, it would be disrespectful to the Government to suppose that it will not acquiesce in the decision, unless it is satisfied that the decision was wrong on the merits of the case, and that further examination before a judicial tribunal will make it apparent that it was so. In that case it may avail itself of the right above referred to of re-litigating the matter, by becoming the actor in a suit, as was done in Carr *vs.* The United States. The Government surely should be content with an advantage like this over a citizen in the proceedings which may be taken to determine which has the better right to property, claimed by each adversely to the other.

In the case at bar, it is a question whether, in spite of the disclaimer in the suggestion of the Attorney General of any submission of the rights of the Government to the jurisdiction of the court, the Government has not in fact made itself a party to the suit, so as to be bound by the judgment which has been rendered. If it has not done so, the writ of error which has been sued out by the United States ought to be dismissed: for nothing is better settled than that no one who is not a party to the record can maintain a writ of error.

Payne *vs.* Niles, 20 Howard, 219.

However this may be, it is certain that the Government cannot believe that the whole merits of this case have not been thoroughly investigated and fully ascertained; for there never was a case in which all possible grounds of defence on the part of the Government were more earnestly and ably presented and insisted upon than they were in this.

It will hardly be contended that the exemption of the United States from liability to be sued without their consent, is more perfect than the exemption of the States, under the eleventh amendment, from liability to be sued, in the Federal courts, by citizens or subjects of any foreign State.

Repeated and well-considered adjudications of the Supreme Court have settled, beyond controversy, that the exemption recognized by the eleventh amendment applies to those cases only in which the State is a party to the record; that making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest; and that the court may proceed to decree against him, and to grant the same relief it would grant against the State, if the State could be sued, and had been made a party defendant.

See Davis *vs.* Gray, 16 Wallace, 203, and the cases therein cited; to which may be added the case of The United States *vs.* Peters, 5 Cranch, 115.

In the last mentioned case, Chief Justice Marshall, delivering the opinion of the Court says, on p. 139:

> "The State cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of another State, where a State is not necessarily a defendant. In this case the suit was not instituted against the State or its treasurer, but against the executrixes of Daniel Rittenhouse for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a question on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual, must arrest the proceedings of the Court and prevent their looking into the suggestion and examining the validity of the title."

The question upon which it was not necessary to give an opinion in that case, because it appeared that the State was not in actual possession of the property in controversy, did subsequently arise in the case of Osborne *vs.* The United States Bank, 9 Wheat., 736, and was decided by the Court.

In that case it appeared that the tax, the validity of which was disputed, had been collected under the orders of the Auditor of the State of Ohio, and had been paid over by him to the treasurer of that State, who "passed the sum to the credit of the State as revenue;" keeping it separate from other moneys, until "the moneys in the treasury were seized upon by a committee of the House of Representatives;" soon after which, that treasurer resigned his office, and this money, still remaining in the treasury separate from other moneys, came to the hands of his successor in office, who gave a receipt for the same as treasurer of the State, and continued to hold it "as treasurer and not otherwise," having "no private, individual interest" in it.

It thus became necessary for the court to decide whether the money which had thus become the "actual property of the State" of Ohio, could be recovered from the officer of that State in whose custody it was; and the court held that it could be, and decreed accordingly against that officer for its restitution. (See pages 743 and 870–871.)

Chief Justice Marshall, who delivered the opinion, saying, page 858, that—

> "It has been shown, we think, that an action of detinue might have been maintained for it, if the bank had possessed the means of describing it; and that the interest of the State would not have been an obstacle to the suit of the bank against the individual in possession of it."

In another part of the same opinion, page 842, it is said:

> "The objection is that as the real party cannot be brought before the court, a suit cannot be maintained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit.

"This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process; it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit."

In showing that in all cases in which jurisdiction depends on the character of the party, the party named on the record will alone be regarded, he says, page 855:

"Suits brought by the Postmaster General are for moneys due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States."

In the case of Swasey *vs.* North Carolina Railroad Company, 1 Hughes, 20, Chief Justice Waite says:

"If the State could be brought into court, it undoubtedly should be made a party before a decree is rendered; but since the case of Osborne *vs.* The Bank of the United States, reported in 9 Wheaton, 738, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents without making the State a party, when the property or agent is within the jurisdiction. In such cases the court acts through the instrumentality of the property or the agent.

"The real question therefore presented for our determination is whether the court has jurisdiction of the property which it is sought to charge, or of the agent of the State having it in possession."

If there could be any doubt that these well-settled principles are applicable to the case at bar, it would be removed by the authorities directly in point, to which reference will now be made.

In the case of Meigs *vs.* McClung's Lessee, 9 Cranch, 11, (decided in the year 1815) the land for which ejectment was brought was land upon which the United States had a garrison, and had erected works at a cost of $30,000. The defendants were officers of the United States, and, in addition to other defences, "objected and insisted that the action could not be maintained against them because the land was occupied by United States troops, and the defendants, as officers of the United States, for the benefit of the United States, and by their direction;" thus raising the very question which is raised in this case by the suggestion of the Attorney General.

The objection was overruled by the court below, which (along with other instructions given by it) instructed the jury, that—

> "If the land was private property, the United States could not deprive the individual of it, without making him just compensation therefor."

Exception was taken to this ruling; and verdict and judgment having been rendered in favor of the plaintiff, the case was taken upon writ of error to the Supreme Court of the United States, where the judgment was affirmed. Chief Justice Marshall, who delivered the opinion of the court, saying:

> "The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence and without compensation. This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished to the lands in controversy, *and that the plaintiff below might sustain his action.*"

There having been thus, at this comparatively early day, a clear, unanimous, and direct adjudication by the Supreme Court of the United States that an action of ejectment might be sustained against officers of the United States, holding, in that character only, property used by the Government for military purposes, and claimed by the Government as belonging to it by virtue of a treaty made with the Cherokee Indians; the question does not seem to have been since raised in that court, although more than one case has been decided by it in which it was presented by the record.

See Brown *vs.* Huger, 21 Howard, 305.
Wilcox *vs.* Jackson, 13 Peters, 498.
Grisar *vs.* McDowell, 6 Wallace, 363.

The suit of Brown *vs.* Huger was brought in a State court and removed under the act of 1789 to the United States circuit court, because it was against an officer holding under the authority of the United States Government.

See p. 308 of 21 Howard.

In the case of Wilcox *vs.* Jackson, it appears, p. 508, that the "writ of error was sued out at the instance of the United States; they being the parties interested in the case."

On p. 510, it appears that "Wilcox went into and continued in possession, claiming the right of ownership, but as an officer of the United States only, in command of said post, acting under the orders of the Secretary of War, his superior officer, and the United States."

Mr. B. F. Butler, of New York, who had, not long before the case was argued, resigned the office of Attorney General, and Mr. Felix Grundy, who had been appointed to succeed him in that office, accordingly appeared as counsel for the plaintiff in error.

No question was raised as to jurisdiction, although the justice who delivered the opinion of the court says, p. 515 :

"Wilcox, the defendant in the original suit, did not claim or pretend to set up any right or title in himself. He held possession as an officer of the United States, and for them and under their orders. This being the state of the case, the question which we are now examining is really this: Whether a person holding a register's certificate without a patent can recover the land as against the United States?"

He afterwards speaks of the suit as "having been in effect against the United States."

It cannot be said that the exemption from liability to be sued was a privilege that might be waived by the Government, and that the failure to make the objection was in effect such waiver. Congress alone had the right to waive the exemption, if it existed; and if a waiver was necessary, the court could not properly have exercised jurisdiction without a waiver by Congress. Its consent must be "given by law."

United States *vs.* McLemore, 4 Howard, 288.
Hill *vs.* United States, 9 Howard, 389.

The objection, however, so far from having been waived, or attempted to be waived, by those representing the Government, had been actually made in the court below, as is shown by the report of the case in 1 Scammon, 344.

That court (the supreme court of the State of Illinois) says, p. 365 of 1 Scammon:

"The first objection, that no action of ejectment can be sustained against a military officer in the occupancy of lands, is readily disposed of."

And after referring to the case of Meigs *vs.* McClung's Lessee, thus disposes of the question:

"The defence is not to be tolerated for a moment. Such an act was clearly a military usurpation, and illegal and indefensible in any point of view in which it could be placed. This objection, then, is necessarily altogether untenable. We are not yet prepared to admit the maxim *inter arma leges silent.*"

It is not to be supposed that the objection would not have been renewed in the Supreme Court of the United States if the eminent counsel there representing the Government had not been satisfied that it would be unavailing.

Although the question was not there raised, it was in effect decided by that court, not merely by the exercise of jurisdiction in the case, but even more pointedly. Mr. Justice Barbour, after making the statement of facts, from which an extract has already been given, says that upon the facts as stated by him two questions arose, which embraced the whole merits of the case, one of which was whether if Beaubean (under whom the lessor of the plaintiff claimed) acquired any title at all, "it is such an one as will enable the lessor of the plaintiff to recover in this action." P. 510.

He then goes on to show that he could not recover in the action, not because the action could not be maintained if he could show good title in himself, but because the title of the United States was better than his title.

In the case of Grisar *vs.* McDowell, "the plaintiff claimed as seized in fee under title from the city of San Francisco. The defendant claimed possession as an officer of the United States, setting up that the property was public property of the United States reserved for military purposes." No doubt was suggested as to jurisdiction, and the case was decided on its merits.

The celebrated Pea-Patch case, of which an account will be found in the American State Papers, Military Affairs, vol. 2, p. 376 and p. 625, and in an appendix to the first volume of the Reports of Wallace, Jr., shows that, although the question was suggested by counsel, the idea was not then entertained that an action of ejectment was not sustainable against officers of the United States for Government property held by them in that character—there having been two trials and judgments rendered in actions of ejectment for the property in controversy (Fort Delaware) before there was any action by Congress under which it could be claimed that the United States had given its consent to the prosecution of legal proceedings against it.

The case of French *vs.* Bankhead, 13 Gratt., 183, was one in which an action of ejectment was brought against the military officer of the United States in command at Fortress Monroe, for the recovery of land of which the United States claimed to be owner, and occupied by him as such officer. The defendant was represented in the Supreme Court of Appeals of Virginia—the action having been brought in the State court, and never removed to a Federal court—by counsel, one of whom (Joynes) was, at the time, United States district attorney—and it was decided in favor of the defendant, upon the ground that the United States was entitled to the property in controversy. No objection to jurisdiction was made at any stage of the case.

In the case of Dreux *vs.* Kennedy, 12 Robinson's (Louisiana) Reports, p. 489, it was held upon the most careful consideration, and after elaborate and able argument *pro* and *con*, that such an action is sustainable.

The court, after a full discussion of the question, says:

> "Upon the whole we conclude, that, if, when the party in possession, who is sued in such an action, points out the owner under whom he holds, he is bound to defend the action if such owner does not live in the State, and is not represented in it; still more should he be so, when such proprietor, lessor, or principal is the United States, against whom no direct action can be brought. If it were not so, the clearest right might be defeated, and the party suing be without remedy. The court, therefore, in our opinion erred in sustaining the exceptions."

The exceptions referred to had been taken on the ground that the United States were in possession, and the real party in interest—the defendants being mere occupants, as agents and officers of the United States, of the buildings which had been erected for, and were then used by, the Government as a branch mint, and not having any right to the possession of the property, or to defend the action.

In the still more recent case of Polack *vs.* Mansfield, decided in 1872 by the Supreme Court of California (44 Cal. Rep., 36) it was held that an action of ejectment may be brought against an officer of the Army of the United States, in possession of the demanded premises, for the purposes of a military camp or fortification, under the direction of the Secretary of War or of the President of the United States.

The court, after stating the general rule to be that a mere servant or employee, having no right to the possession of premises, but acting under the control of another, cannot be sued in an action of ejectment brought to recover them, says:

> "But the rule which thus exempts the mere servant or employee of another from an action, pre-supposes that the employer may be sued, and that the wrongs of which the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case, therefore, where the employer is, for any reason, not amenable to an action, the rule referred to has no application, and the employee or servant becomes *ex necessitate* the proper party defendant, since he is the only party who can be subjected to suit at all. Were this otherwise, it would result that open and admitted violation of private rights would find no redress in the courts of the country. The Government of the United States, as such, cannot be sued as a party defendant in the courts of the State; and unless its servants and employees may be properly held responsible for the lawless invasion of private property, committed by them under the direction or command of the Government, the citizen is left wholly without the protection which it is the first aim and purpose of the municipal law to afford."

See also, King v La Grange, "The Reporter", Vol. 14 p. 428

In the case of Avery *vs.* Fox, 1 Abbott's U. S. Rep., 246, it was held by the Circuit Court of the United States for the Western District of Michigan, in 1868, that the courts have power to restrain, by injunction, the agents of the

United States from appropriating to the use of the Government property of which they have taken possession under its orders against the consent of the owner, without compensation.

The case of Cooley *vs.* O'Connor, 12 Wallace, 391, was an action brought to try the title of the United States to property purchased by them at a sale for taxes under the act of 7 June, 1862. It was brought against parties holding possession as mere tenants at will, or licensees of the United States. The Government defended the action—the only question being whether the tax sale was valid and effective to divest the ownership of the plaintiff, and to vest the property in the United States.

The judgment of the court below in favor of the plaintiff was reversed, and the case remanded for further proceedings—no doubt whatever as to jurisdiction appearing to have been entertained by counsel, or court.

In all cases in which the title of the Government to property is disputed, and a suit is brought against its agent in possession, the question is whether he can justify, and how? There can be no pretence that he holds the property rightfully unless the United States has a good title. If it has not, he is a mere trespasser. It will hardly be contended that he could justify by producing forged title papers; or that the Attorney General, by producing such papers, could have the suit dismissed. Why not? Because forged papers convey no title, and would not extend the authority of the United States over the property in question. The same principle will apply to a title void, or invalid, for any other cause.

The United States can neither acquire title to, nor hold possession of, property, except under and by virtue of the Constitution, and laws made pursuant thereto. Possession held by its officer or agent where the United States is not lawfully authorized to hold possession is not the possession of the United States, but is an *unauthorized* holding by its officer or agent; for the United States as a political entity *cannot* authorize that which is unlawful—it has no *power* to speak save under and in accordance with the Constitution and constitutional laws.

If it has in fact no title, it can confer upon its agent no authority to take or hold the property. It can acquire no title to the property of the citizen unless it has legally divested him of it. Until it is shown that it has done so, his controversy is with the agent and not with the Government; precisely as in any other case where the act of a public agent is void for want of authority. Unless this be so, the courts will be ousted of their jurisdiction in every case where the defendant interposes a plea of official authority. He will only have to set up a commission under the seal of the United States, authorizing him to do the act, to close all inquiry as to its legality.

If the citizen has no right to demand judicial investigation to determine whether or not he has been deprived of his property without, or against, law, by those who represent the Government, of what value, so far as property is concerned, is the constitutional provision that no person shall "*be deprived of life, liberty, or property*, WITHOUT DUE PROCESS OF LAW?"

If that provision means anything, it means that he shall in *all* cases have a right to *judicial inquiry* into the validity of his claim to any property of which the Government may seek to deprive him.

The case of The People *vs.* Ambrecht, 11 Abbott's Prac. R., 97, which was relied on by the counsel for the Government in the court below, is not the decision of a court, but of a "referee" merely, under the New York practice.

It is true that Brightly in his Digest adds to his abstract of the case the words "said to have been affirmed by the court of appeals." By whom or when it was so "said" he does not inform us, and the digests and reports have been searched in vain for any other evidence of such affirmance.

The case does not seem to have been thoroughly argued or considered, and is certainly entitled to but little weight, in opposition to the deliberate decisions hereinbefore referred to, made by courts of last resort.

The case of Carr *vs.* The United States, 98 U. S., 433, already referred to, was decided in the interval between the rendition of the verdict and the entry of the judgment in the case at bar; and it cannot be denied that in the opinion delivered in that case views are expressed in conflict with those that have been insisted upon in this brief. Accordingly, that case was relied upon as showing that the new trial which had been asked for should be granted, and the suit dismissed for want of jurisdiction. But the learned judge who presided at the trial, did not think that the decision in that case was of such a character as to require him to reverse his previous rulings and dismiss the suit.

See his reasons for coming to that conclusion in the note appended to the report of the case, 3 Hughes, 150.

It is respectfully submitted that those reasons were sufficient. All that was said in that case which conflicted with his previous ruling being in no degree necessary to sustain the conclusion to which the court came on the question of estoppel, and entirely *obiter*.

There is no reason to suppose that the question arising in the case at bar was fully argued by counsel or thoroughly examined by the court in the case of Carr *vs.* The United States; and the expectation is confidently entertained that, upon the deliberate consideration which the court will bestow upon the question, now that it is brought before them for *decision*, the opinion therein expressed as to the course proper to be pursued when it is made known to a court that the suit is against an officer or agent of the Government in possession of property claimed by it, will not be adhered to, and that the decision of the court below in this case will be sustained.

If it is not sustained there will be an absolute denial of justice to the defendant in error, Congress having been already memorialized in vain.

If he is turned out of court for want of jurisdiction, a precedent will be established under which the Government will be enabled to appropriate, at its pleasure, private property to its own use without the consent of the owner, or compensation to him, and to forbid all judicial inquiry into the legality of the act.

If it be settled that the Government has this power, nothing will prevent cases from arising that will render it impossible for courts to say, as was said in McClung's Lessee *vs.* Meigs, that "the United States CANNOT HAVE INTENDED to deprive an individual of his property by violence and without compensation."

It is respectfully submitted that, even if this suit were not maintainable upon the foregoing grounds, the Government has in effect authorized it, in cases like this, by empowering the commissioners to purchase the property for the United States, and to give a certificate of sale therefor, which certificate may, by the very terms of the law, be affected as evidence of the regularity and validity of the sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed.

The views which have been presented apply to the first five assignments of error in the brief filed by the counsel for the plaintiffs in error.

II.

The sixth, seventh, eighth and tenth assignments of error bring in question the principles upon which the decisions of this court in the cases of Bennett *vs.* Hunter, 9 Wallace, 326, and Tacey *vs.* Irwin, 18 Wall., 549, rest.

In Bennett *vs.* Hunter it was held that under the act of June 7th, 1862, as amended by the act of February 6th, 1863, the right to pay the tax and relieve the land from sale is not limited to sixty days after the amount has been fixed by the commissioners, but exists until the sale is made; and further, that such payment was not required to be made by the owner in person, but might be made by any one acting in his behalf, whose act was not disavowed by him—the court being of opinion that the sole object of the act, until after the sale should be actually made, being to raise revenue by a tax on land, there could be no right to sell when the tax was paid or tendered by or on behalf of the owner.

But it is insisted in the brief which has been filed on behalf of the plaintiffs in error that this ruling applies only to cases in which *individuals* became purchasers at tax sales; that there is a distinction between sales under the act to *individuals* and sales to *the United States;* and that, though the commissioners might not have authority to sell to an *individual* in any case where a tender of taxes had been made in behalf of the owner, they did have the right, under the express terms of the act, to sell to *the United States*, unless the owner appeared *in person* and paid or offered to pay the tax.

A sufficient answer to this position is that it cannot be supposed that Congress could possibly have intended, where the land of the citizen was not liable to be sold for taxes, to make it so, for the purpose of enabling the Government to purchase it.

If there could be any doubt on this point it would be removed by looking to the history of the amendment from which this consequence is claimed to flow. From the Congressional Globe of 26th January, 1863, (Part I of Congressional Globe, 1862–'63, p. 508–9,) it appears that Senator Sumner had introduced a bill, number 458, in the following words:

> "Whereas by an act of Congress approved June 7th, 1862, entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' it was ordered that direct taxes not peaceably collected in any State, shall be charged on the lands, which lands shall be sold to the highest bidder; and whereas the sale of such lands in islands on the coast of South Carolina and Georgia, in and about Port Royal, may seriously interfere with the cultivation of cotton on behalf of Government by the freedmen on those islands, and also with the successful education of such freedmen to habits of independent industry, through the purchase of such lands at low prices by speculators and other parties taking no interest in such free labor, who would also have a right to eject such free laborers from their homes; therefore,
>
> "*Be it enacted, &c.*, That the sale of lands for taxes in the islands on the coast of South Carolina and Georgia, in and about Port Royal, be suspended until the 1st day of December, 1863, or to such further day after that date as the Secretary of the Treasury may appoint.
>
> "Sec. 2. *And be it further enacted*, That when the Secretary of the Treasury shall direct the sale of the said lands, homesteads shall be reserved therein for the freedmen in lots not exceeding five acres to each man, to be sold or let to said freedmen under the direction of the Secretary of the Treasury."

This bill was reported by the Committee on Military Affairs with an amendment to strike out all of it, and to insert in lieu thereof the following:

> "That the President of the United States be, and he hereby is, authorized to suspend the sales of lands liable to be sold for taxes under the act approved 7th June, 1862, entitled, 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' whenever, in his opinion, the public interest would be thereby promoted."

This amendment was rejected; and Senator Doolittle then offered an amendment to the 7th section of the act of 7th June, 1862, "in the nature of a substitute for the committee's bill;" which amendment so offered, with some modifications not affecting the questions in issue in this case, was subsequently adopted by both Houses of Congress, and was approved by the President on the 6th February, 1863.

As soon as the amendment had been read by the Secretary of the Senate, Senator Sumner said:

"I will make a brief statement in regard to this bill. The original bill, as introduced by me, provided for a suspension of the sales which are now proposed to be made on the 11th of February now near at hand, in South Carolina and in Georgia. It was feared that the land would be purchased by speculators, so that the colored population that had during the last year been working on the lands, would be excluded from the enjoyment of them. To prevent that exclusion, it was proposed to suspend for awhile these sales, in the hope of, in that way, driving off the speculators, or at any rate enabling the Government to make some arrangement for the benefit of the freedmen. The Committee on Military affairs accepted that view, and reported a bill accordingly; but on inquiry, it appeared that the Senator from Wisconsin, who, it will be remembered, originally presented the bill, at the last session, under which these sales take place, had some further propositions of amendment; and it also appeared on consultation with the commissioners, who have recently returned from that place, that it was not considered expedient that the sales should be suspended. It was thought better to accomplish the same result in another way, and to that end, the Senator from Wisconsin added to his proposed amendment the following words:

"'And provided further, that at such sale any tracts, parcels, or lots of land which may be selected under the direction of the President for Government use, for war, military, naval, revenue, charitable, educational, or police purposes, may, at said sale, be bid in by said commissioners, under the direction of the President, for and struck off to the United States.'

"Under these words it is supposed that ample provision can be made for the colored population on the land, and that was the object of the original bill."

Nothing further was said by any one as to this provision: but the colloquy (quoted in the brief of the counsel for the plaintiffs in error) ensued between Senators Fessenden and Doolittle, as to the effect of the only other material change proposed to be made in the act of 7th June, 1862, that is to say, by striking from the original act the words:

"and the said commissioners shall at such sale strike off the same severally to the United States, at that sum, unless some person shall bid the same or a larger sum,"

and substituting in their place the words:

"in all cases where the owner of said lots or parcels of ground shall not, on or before the day of sale, appear in person before the said board of commissioners, and pay the amount of said tax, with ten per centum interest thereon, with the costs of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale, to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum."

It is manifest that the object of this change was to enable the United States to become a purchaser of the land in cases in which it could not do so under the act of June 7, 1862.

As was said by Mr. Justice Miller, delivering the opinion of this court, in Turner *vs.* Smith, 14 Wallace, 561:

> "The intention in making this change seems to us to be to remove the restriction by which the United States must either take the land for the taxes or let it go to whoever would pay the taxes, or any greater sum, if he was the highest bidder. After the amount due was offered, the Government was, by the first statute, no longer a competing bidder, and the owner was at the mercy of private bidders. Under the new statute the commissioner could become a competitor after the amount of the tax was bid, with two limitations. First, he should not bid against a purchaser whom the owner by request preferred; and, secondly, he should not bid beyond two-thirds of the value."

To avail himself of the privilege conferred on him by this amendment of preventing the United States from becoming the purchaser of his land at two-thirds of its assessed value, and of designating the friend to whom it should be struck out at less than that amount, the owner was required to appear *in person* and make the request. But this was the only purpose for which his personal presence was made necessary. The provision as to his payment of the tax with interest and costs was not designed to prescribe an exclusive mode in which the tax must be paid; but was simply a recognition of the right of the owner to pay it at any time before the sale.

It is by inference and implication only that any other construction can be placed on the language used. It will be observed that it is not said that the owner shall not have the right to pay the taxes, interest and costs, and thus prevent a sale of his land, unless he appears in person to do so. Nor does the provision, in terms, give to the payment, by the owner in person, the effect of preventing a sale. There is no doubt that such payment would have that effect; but it would result, not from the terms of the law, nor from the personal presence of the owner; but from the fact of payment—that being alone material—the whole purpose for which the sale was ordered to be made being accomplished by it.

It seems to be quite manifest that even if Congress possessed the power (which is denied) to require the personal presence of the owner as a condition upon which he should be allowed to pay the taxes assessed upon his land, and thus prevent a sale, it did not attempt to exercise it.

But if Congress had the power so to require, and if the statute could be construed as making the personal presence of the owner necessary to the payment of the tax so as to prevent a sale to the United States at two-thirds of the assessed value of the land, the title acquired by the purchase made at the sale in the case at bar would not be rendered valid.

The sale in this case was not made under the provision authorizing the commissioners to bid two-thirds of the assessed value of the land; but was made under the distinct, independent provision, added to the amendment for the purpose indicated by Senator Sumner, by which the commissioners were authorized to buy, at the sales made by them, lands selected, under the direction of the President, "for Government use, for war, military, naval, revenue, charitable, educational, or police purpose;" and that provision does not require, or make any reference whatsoever to, the personal presence of the owner. It simply authorizes the lands to be bid in for the Government, and struck off to the United States, at such sales as might be lawfully made by the commissioners.

It is hardly necessary to notice the statement made in the brief of the counsel for the plaintiffs in error, that the only evidence of the tender of the tax in this case shows that it was made *after* the sale, the court having instructed the jury that it was necessary that they should believe from the evidence that it was made *prior* to the sale, for them to give the defendant in error the benefit of it. But it may not be amiss to say that it is manifest that Johnson was mistaken only in supposing that Foster was the commissioner to whom the tender was made, and was right in his statement that it was made *prior* to the sale; and that this was the conclusion to which the jury came.

In Tacey *vs.* Irwin this court held that neither payment nor tender was necessary where the commissioners of sale had adopted a general rule that they would not receive payment except from the owner in person. That "the law does not require the doing of a nugatory act;" and that "such a rule of necessity dispenses with a regular tender in any case."

Accordingly the sale was held void, though no tender had been made—the relative of the owner who went to the office of the commissioners "to see after the payment of the tax" making no offer to pay, because he was informed that they would receive payment from no one but the owner in person.

It was insisted on behalf of the defendant in error in that case (as will be seen from the brief of his counsel, Mr. S. F. Beach,) that no valid sale for taxes could be made where the owner of the land had been denied the opportunity given him by law to prevent a sale, by paying the tax. That, as had been settled by the decision in Bennett *vs.* Hunter, the opportunity allowed him by law was the right to pay at any time down to the moment of sale, by the hands of any person. That a denial of this right in part was equivalent to a denial of it altogether, for the part denied might be that which gave value to the whole.

That it would not be questioned that a sale would be void if the commissioners should adopt and enforce a rule by which no tax would be received after the expiration of thirty, instead of sixty, days from the time of fixing it; or if they should set any other definite time, short of that allowed by law, within which, or not at all, payment would be received. That, for the same reason, the adoption and enforcement of a rule by which no tax would be received, unless paid by the owner in person, rendered the sale void; an unlawful restriction of the *manner* of payment, not being distinguishable in principle from an unlawful restriction of the *time* of payment.

In answer to the suggestion thas it was not enough to invalidate a sale to show that there was a general denial of the privilege of payment by the hands of any person, but that the owner must go further and show that, notwithstanding such denial, he actually made an attempt to pay, and that his attempt failed because of the rule established by the commissioners, it was insisted that the case stood on the same footing as if the owner had been in like manner denied half the *time* allowed by law within which payment might be made, in which case it would hardly be contended that he would be bound to show that he had made an attempt to pay after the time had elapsed within which, under the rule, payment would be received from him.

It was further insisted that, where one party refuses to accept, he will not be allowed to say that the other party would not, or could not, do that which, but for such refusal, it would have been his duty to do. That when it was shown that the commissioners rendered it impossible to pay the tax in the manner allowed by law, it was not necessary to show further an attempt, notwithstanding, to perform the impossibility.

These positions seem to be impregnable. They were fully sustained by the decision rendered in the case, and show clearly that the instruction complained of in the sev-

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These positions seem to be impregnable. They were fully sustained by the decision rendered in the case, and show clearly that the instruction complained of in the seventh assignment of error was properly given, and that the court was right in refusing to give that referred to in the eighth assignment.

Since the foregoing portion of this brief was prepared, the writer has seen the case of Hills *vs.* Albany Exchange Bank, decided at October Term, 1881, and reported in Morrison's Transcript, which sustains the view that has been taken.

Mr. Justice Miller is reported to have said, in delivering the opinion of the Court:

> "A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. That question is whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived, or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. (Bennett *vs.* Hunter, 9 Wall., 326; Tacey *vs.* Irwin, 18 Wall., 549; Atwood *vs.* Weems, 99 U. S., 183.)"

III.

As to the *ninth* assignment of error, there can be no doubt that the instruction therein referred to was properly refused.

It matters not what the owners of the property might, or would have done at the time, if it had then come to their knowledge that payment of the tax had been tendered for them by a friend; the only thing it could be at all material to inquire into was what they did when it was made known to them, and it clearly appeared that they ratified and approved, and were insisting upon the right to avail themselves of the act of their friend in making the tender for them; there not being a scintilla of evidence to show that when it was brought to their knowledge, or at any time afterwards, they hesitated for an instant to ratify and approve it.

But if it had been material to ascertain whether the parties would or would not, at the time the tender was made, have disapproved it if they had then been informed of it, there was no evidence to authorize the court to give the instruction asked for. The law presumes, "in furtherance of justice," that a party will ratify an act done for his benefit. And the facts that the property was then owned by the wife of General Robert E. Lee, and that the present plaintiff is his son, and was then himself an officer in the Confederate army, are surely not in themselves sufficient to authorize a jury, in the face of this presumption, to come to the conclusion that they would have disapproved it.

The statement on page 9 of the brief filed by the counsel for the plaintiffs in error, that—

> "The court charged the jury that such a general rule and practice would render a sale void even though the jury found from the evidence that the owner or owners of this property would not, at any time before the surrender of General Lee in 1865 have approved a tender of payment of taxes by any person" is erroneous. No such charge was given or asked for.

IV.

As to the *eleventh* assignment of error, an examination of the 6th and 7th instructions, to be found on pages 106 and 107 of the Record, which were given at the instance of the plaintiffs in error, will show that they have no right to complain of the rulings of the court as to the proofs which it was necessary for the defendant in error to adduce for the purpose of satisfying the jury of the existence of the general rule of the commissioners not to receive taxes except from the owner in person, after the advertisement, and before the sale.

Nor can they complain of the character of the evidence allowed to be introduced. It was surely competent to prove the uniform practice of the commissioners, both before and after the sale of this property, to show that this rule was, in no instance departed from or relaxed.

In this connection it may not be amiss to call attention to the fact that the statement made on page 41 of the brief of the counsel for the plaintiffs in error, of the testimony of Jefferson Tacey, as shown by page 94 of the Record, is not only incomplete, but inaccurate.

He is quoted as having said:

> "They refused to receive the taxes from any one but the owner, or a party in interest to the property. This conviction was produced by conversations which occurred in the office, and from a general report in the community. It was generally known."

And the commentary made upon this, in the brief, is:

> "This was manifestly hearsay, the reception of which upon the most material question of fact in the case, ought to result in a reversal of the judgment and the granting of a new trial."

What Jefferson Tacey did say, as will appear on the page referred to (94 of the Record) was:

> "I resided in Alexandria during the war. I had frequent occasion to visit the office of the direct tax commissioners here.
>
> "They refused to receive the taxes from any one but the owner, or a party in interest in the property; that is, from the owner in person, or a party in interest in person. It has always been my conviction that they would not receive it from the hands of a friend or an agent. That conviction was produced from conversations which occurred

in the office of the tax commissioners, and from a general report in the community. These conversations were with the commissioners, or between the commissioners and myself, or between the commissioners and other parties in my presence."

He testified further on the same subject, but said nothing at all variant from the extract just given

V.

As to the *twelfth* assignment of error.

It will be seen, on page 122 of the record, that instructions covering the same ground, and to precisely the same effect, with the instruction on page 121, the refusal to give which is complained of, *were* given by the court, at the request of the plaintiffs in error. It is said, in the brief filed by their counsel, that the instructions on page 122, which were given, "are in direct conflict with the instruction on page 121, which instruction, or rather refusal to instruct, however, was not withdrawn or explained. Both being in the case, and before the jury, they must have had difficulty in understanding the rule by which they were to be governed."

It is difficult to understand how it can be said that a "refusal to instruct," is not "withdrawn," when the same instruction is subsequently given at the instance of the same party. And it is equally difficult to understand how a *refused* instruction is "before the jury," so that the subsequent giving of the same instruction creates difficulty in their minds "in understanding the rule by which they are to be governed."

No objection has been, or can be, made by the plaintiffs in error to the instructions that were given by the court, as to this matter. They could not have asked for instructions more favorable to themselves in the position they had then taken.

As to the suggestion that the evidence on the point referred to in these instructions did not support the verdict, and that the new trial asked for ought therefore to have been granted, it is unnecessary to do more than refer to the record, which shows that from the commencement of the case down to the time when the non-suit as to all of the defendants, except Kauffman and Strong, was taken, the plaintiffs in error had insisted under oath, and their counsel had certified that, after careful inquiry into the facts, he believed it to be true that the defendants who were upon the premises, other than Kauffman and Strong, (who held under and for the Government as its officers and agents,) did not claim title to the land, or occupy the same as tenants, but under permission of the officers in charge of it as a military reservation; and it was insisted that they therefore were not occupants within the meaning of the ejectment law.

The defendant in error having reason to believe that some of them, at least, stood in a different relation to the property from that alleged by them, endeavored to establish that fact; but having failed to do so, took a non-suit as to all except Kauffman and Strong. Whereupon the counsel for the plaintiffs in error shifted their position, and endeavored to prove that these defendants, as to whom the non-suit had been taken, were tenants having rights as against the Government, and occupants within the meaning of the ejectment law; and introduced for that purpose one of the plaintiffs in error (Strong) as a witness, he having been previously introduced by them to prove the contrary. The effort thus made was, however, a failure; the witness, Strong, as will be seen on page 113 of the Record, distinctly reaffirming the truth of the statements made in the petitition to be found on pages 7–10, and again on pages 109–111 of the Record.

It is not perceived how the fact that a second suit had been brought by the defendant in error as to fourteen parties occupying the same position on the premises with the defendants as to whom the non-suit was taken, and in which no action had been had (it having been stipulated, see page 28–29 of the Record, that it should abide the event of this suit) can strengthen the position which the counsel for the plaintiff in error, after the non-suit, took as to this matter.

VI.

As to the *thirteenth* assignment of error it is enough to say that the defendant in error proved (no attempt being made to contradict the testimony in any particular) that his grandfather, G. W. P. Custis, under whose will he claimed title to the property, was, at the time of his death, in the year 1857, in peaceable and quiet possession thereof, and had been so for very many years, paying regularly the taxes thereon, which were assessed against him as owner—one of the witnesses, George R. Adams, sixty-eight years old, stating that from his earliest recollection Mr. Custis had held such possession. That upon the death of Mr. Custis the property went into the possession of his daughter, Mrs. Mary A. R. Lee, as the life tenant under his will, the same being charged to her as owner on the land books of the State of Virginia, and that she, with her husband and family, resided thereon until some time in the year 1861, when they left the place in charge of an overseer. That it was subsequently taken possession of by the Government, and still later, to wit, on the 11th of January, 1863, sold as property belonging to her for the direct tax which had been assessed thereon; at which sale the United States became the purchaser, as shown by the certificate of the tax commissioners. There was no evidence to show that prior to the date of said sale any claim to said property, or to any part thereof, had ever been set up by any one, adversely to said Custis, or to those claiming under his will. It was further proved that the life-tenant, Mrs. Mary A. R. Lee, died in the year 1873.

It cannot be necessary to cite authorities to show that this was sufficient proof of title in the defendant in error for him to maintain his action, and that the court rightly refused to give the instruction asked for.

VII.

There is no assignment of error because of the alleged insufficiency of the proof of the execution and contents of the will of G. W. P. Custis; but at the close of the brief of the counsel for the plaintiffs in error, a case is referred to as authority to show that the proof was insufficient; from which it is to be inferred that the objections made on the trial of the case, to the admission of the copy of the will in evidence, have not been abandoned.

An examination of the case referréd to, (Darby's Lessee *vs.* Mayer, 10 Wheat., 465,) will show that it really has no bearing upon the question as to the admissibility of the copy of the will of Mr. Custis in evidence; that being a case in which a copy of a will probated in Maryland, by which lands in Tennessee were devised, when offered in evidence in Tennessee in an action of ejectment brought for the lands, was held to be inadmissible, because it did not appear to have been proved in Maryland in such manner as to show that it was executed with the solemnities required by the law of Tennessee to pass lands—the court declining to express any opinion upon the question whether it would have been admissible if the copy had shown upon its face that it had been proved in such manner as to show that it was executed with those solemnities.

Under the uniform practice in Virginia, a certified copy of a probated will is always admitted in evidence in lieu of the original.

See Morrison *vs.* Campbell' 2 Rand., 217.
Ben *vs.* Peete, Id., 539.
Corbett *vs.* Nutt, 18 Gratt., 624.

Indeed, the statutes of Virginia expressly make the certified copy evidence.

See Code of Virginia, chap. 118, section 34; and section 37, as amended by act of 26th February, 1876; and chapter 172, section 5, appended hereto.

But if this were otherwise, the objection to the introduction of the copy in evidence was completely removed by proof by the clerk of the court, who was the legal custodian of the original will and of the record of its probate, that the original will had been lost; and the introduction in evidence of the original record of probate.

See page 83 of the record.

A copy of the Virginia statute in reference to the action of ejectment, will be found attached to a brief filed by my associate, Mr. Beach.

Respectfully submitted by

Wm. J. Robertson,
Of Counsel for Defendant in Error.

EXTRACTS FROM CODE OF VIRGINIA—
Edition of 1873.

From section 34 of chapter 118.

"34. A court may, however, without summoning any party, proceed to probate and admit the will to record, or reject the same."

Section 37 of chapter 118, as amended by act of 26th February, 1876, (acts 1875–'76, ch. 101, p. 109.)

"Every will, or authenticated copy so admitted to record by any court, shall be recorded by the clerk thereof, and remain in the clerk's office except during such time as the same may be carried to another court under a subpœna duces tecum: provided that an authenticated copy of any will so recorded may be recorded in the county or corporation wherein lies real estate which is devised by said will."

From section 5 of chapter 112.

"5. A copy of any record or paper in the clerk's office of any court, or in the office of the Secretary of the Commonwealth, treasurer, register, or either auditor, attested by the officer in whose office the same is, and a copy of any such record or paper in the office of the Board of Public Works, or the Board of Education, attested by the secretary or clerk of such board, may be admitted in evidence in lieu of the original."

16-196

OFFICE SUPREME COURT U.S.
FILED
OCT 16 1882
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

THE UNITED STATES,
Plaintiff in Error,
vs.
G. W. C. LEE.
No. 25.

KAUFMANN AND STRONG,
Plaintiffs in Error,
vs.
G. W. C. LEE.
No. 26.

Brief of Francis L. Smith,
Of Counsel for Defendant in Error.
ON RE-ARGUMENT, OCTOBER TERM, 1882.

ALEXANDRIA, VA.:
Ramey & Son, Printers, 11 S. Royal Street.
1882.

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ON RE-ARGUMENT, OCTOBER TERM, 1882.

This is an action of ejectment brought by General G. W. C. Lee for the recovery of a tract of land in Alexandria county, Va., known as the Arlington Estate. The action was instituted in the State Court against the persons actually occupying the premises, and upon their application the Circuit Court ordered its removal there. The Attorney General of the United States then filed a suggestion stating that the United States was the real owner of the property and in possession of the same by its officers and agents, that the suit was in effect against the United States which as a sovereign could not be sued, and asking the Court to set aside the declaration and dismiss the case. It will not be denied that the Government of the United States claims title to the property under a sale for direct taxes made by virtue of the act of Congress of June 7, 1862, that the State of Virginia never consented to the purchase by the Government of the said land, and that this is a case arising under an act of Congress. These being the facts, it is respectfully submitted that the position of the Attorney General is untenable.

The suggestion in this case that the land in controversy is the property of the United States, and therefore protected from such a proceeding as this by the prerogative of the Government as a sovereign, is an attempt to evade the system of pleading, as it exists in Virginia, a course unknown in pleading at common law, or now, and should have been dismissed. In this State the action of ejectment is commenced by serving a copy of the declaration upon the person actually occupying the premises, and the subsequent proceedings are as in other common law suits, the statute regulating the nature of the pleas which may be to the jurisdiction or the general issue of not guilty.

Test this new fangled contrivance which is without reason or authority of law and see what absurd results it will lead to. Suppose the plaintiff denies the truth of the suggestion, viz: That the United States is the owner of and in the actual possession of the land sued for, then, unless we admit the infallibility of the Attorney General, the plaintiff has a right to take issue upon the suggestion and test its verity. Then we have two distinct issues in the same cause, a suit within a suit. The declaration and plea; the suggestion and denial. It is respectfully submitted that such a course is completely at variance and inconsistent with the known and established principles of pleading. The object of such a system is to arrive with certainty at a known and definite issue either of law or of fact. The effect of the suggestion is to produce uncertainty and confusion and a double issue. A state of facts never tolerated in perfect common law pleadings.

Again. The Attorney General asserts that the United States is the owner and occupier of all the land sued for and yet it will be found by a reference to the private acts of Congress, session acts of 1865-6. page 13, that the Congress of the United States has relinquished all the right and title of the United States in and to that portion of the land in controversy which is sought to be recovered of Maria Syphax. In such a case, even in England, where the Prerogatives of the Crown are guarded to the fullest extent, it has been held that the privilege of the sovereign is no bar to a suit for the recovery of the land.

See Adams on Ejectment, Edition of 1840, M. P. 79, citing
Lee *vs.* Norris, Cro. Eliz, 331.
See also, The Siren, 7 Wallace, 159.

Clearly we have shown that the suggestion was untrue in one particular, and that it was necessary to take issue upon it. May it not be untrue in other respects? Suppose the Government was not in the possession of the land, but had leased it to others. Then according to law the prerogative right of the United States is no bar to the suit against the tenant. But though such is the fact, we must submit to being hustled out of Court by the mere ipse dixit of the Attorney General, or take issue upon the suggestion, and try collaterally in the same suit, another suit. The course to be pursued was plain, certain, regular and prescribed by law. The Government could have appeared and been made defendant with, or in the place of the present defendants. It could then have pleaded to the jurisdiction or the merits, at its pleasure. To permit any action under such suggestion, would be to allow the Government by a single side-wipe to blot the case from existence, without affording the plaintiff an opportunity to have his rights passed upon according to law and the forms of law, to cut him off at the knees at the mere dictation of one not a party to the suit. It is a well-established principle of law that one not a party to a suit can not appeal from any order therein.

Supervisors of Culpeper *vs.* Gorrell, 20 Grattan, 484.

The Government is no party to this suit, for it could only be made a party in the mode prescribed by law—by becoming a defendant without qualification, and this it has refused to do. Now if the Court should dismiss the suggestion it would be without remedy—not being a party. If it had become a defendant, then a plea to the jurisdiction would have been the appropriate mode to protect its supposed right of sovereignty.

Words fail to express the confusion and injury that would result, should this unheard of and extraordinary attempt to deprive the plaintiff of an opportunity to test his rights, and by a single suggestion of an individual, evade the responsibility of becoming a party to a suit, be acquiesced in by the Court. It is a denial of the first principles of justice. Both parties should be heard. But the Government by this contrivance tells *its* story, and at the same time shuts the mouth of its adversary. Is it true that its statement of facts will not bear the judicial scrutiny to which the cause of every suitor must be subject, and therefore it seeks by this course to cut off all investigation and enquiry?

The United States has never obtained the consent of the State of Virginia to its purchase, and therefore holds such title as it has to the land, as a private individual. It seems to be conceded by all persons familiar with the structure and frame of our Government, that before the sovereign right of the United States can attach to land purchased in any of the States, there must be a concurrence of two things: First, It must be purchased for a constitutional purpose. Second, By the consent of the Legislature of the State in which the same shall be. If either one of these vitally necessary elements be wanting, then the land is held by the Government not in its capacity as a sovereign power, but as a private individual. Even the counsel for the United States seems to admit the truth of this plain doctrine, for in his Brief he quotes with approbation the following passage from Vattel: "Thus many sovereigns have fiefs and possessions in the territories of another prince. In these cases they possess them in the manner of private individuals."

In Paschal's Annotated Constitution at page 137, the law upon this subject is tersely and concisely stated. He says: "But the purchase of lands by the United States for public purposes, within the territorial limits of a State does not of itself oust the jurisdiction or sovereignty of such State over the land so purchased."

Again. The Constitution prescribes the only mode by which it can acquire land as a sovereign power; and therefore it holds only as an individual when it obtains it in any other manner. And this last proposition is sustained by the highest Court of New York, in the case of People *vs.* Godfrey, 17 Johns, 225; the Supreme Court of Pennsylvania, in Commonwealth *vs.* Young, Brightly, 302; The Supreme Court of Wisconsin, In Re O'Connor, 37 Wisconsin, 379, and Mr. Justice Grier in Ellicott *vs.* Van Voost, 3 Wall, Jr., 299; The Supreme Court of Ohio in Renner *vs.* Bennett, 21 Ohio St., 431. The counsel for the United States has produced no authorities in conflict with these.

Chief Justice Marshall in defining the position of a Government as owner of stock in a Corporation, says: "It is we think a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates, and to the business which is to be transacted. Thus many of the States of this Union who have an interest in banks, are not suable even in their own courts; yet, they never exempt the Corporation from being sued.

The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a Corporation, a Government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the Corporation than are expressly given by the incorporating act.

The Government of the Union held shares in the old Bank of the United States; but the privileges of the Government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The Government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the Corporation, and exercises no power or privilege which is not derived from the charter."

Bank of the United States *vs.* Planters' Bank of Georgia, 9 W., 908.

See also—Bank of Kentucky *vs.* Wister, 2 P., 323.

Briscoe *vs.* Bank of Kentucky, 11 P., 324,

Darrington *vs.* The State Bank of Alabama, 13 H., 17.

In this last case, the Court say:

"The State, as a stockholder, held its property as a corporation or individual could hold it, in the Mobile Bank."

See also—Curran *vs.* State of Arkansas, 15 How., 308.

What is the difference in the relation of the United States to stock in a corporation, and land purchased by it and held as an individual? If in the one case it lays down its sovereignty, why not in the other? If to the corporation it can not and does not impart its privileges and immunities, can it do so to land not acquired in a constitutional way?

Jurisdiction is a favorite and indeed necessary attribute of sovereignty. Yet, if the graves of those who now sleep their last sleep at Arlington, should be desecrated, this very power which is claimed to be sovereign as to this subject, with all of the attributes of such a condition, is powerless to entertain jurisdiction of the offence, and must apply to the Courts of the State to punish the offender. But the distinguished counsel of the Government insists that, a Government which does not possess even jurisdiction over the subject matter, and must apply to the State which does, to preserve peace and order, is endowed with such prerogatives of sovereignty as to prevent a claimant to the property, from asserting his rights in the courts as against an individual in the actual occupancy of the property; *because* the United States which is not sovereign as to this property, claims by a record title. The proposition is without precedent.

In their several and respective spheres, the State and Federal Governments possess the attributes of sovereignty, separate, distinct, and independent of each other. That these privileges may be waived is too well established to need argument. That the Federal Government in acquiring land in any other mode than that prescribed by the Constitution, waives its sovereign rights as to such land, is as palpable and reasonable as where the United States or a State becomes a stockholder in a private corporation, or creates a corporation and is the sole owner of the stock, and has been held thereby, to surrender or waive its prerogative right of sovereignty.

Admit for the sake of the argument that the land in controversy was purchased for a constitutional purpose, that is to say, that a National Cemetery is a Fort, or a Magazine, or an Arsenal, or a dock-yard, or other needful building, yet the necessary concurrent element is wanting.

There has been no cession by the State. No consent by the Legislature of the State wherein the land is, and the Government does not hold the property as a sovereign but as a corporation. It has no jurisdiction, the *vital* power of sovereignty.

The Government of the United States is totally different in form and power from that of Great Britain, and the laws applicable to the sovereign rights of the latter, not consistent with or belonging to the former. The one is a Government of enumerated, and much more limited powers than the other. Chief Justice Marshall has said:—"In America the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." We may contemplate the Government of the Union in a two-fold aspect. First, as a sovereign power. Second, as a corporation. Acting within the scope of its enumerated powers and acquiring land for a constitutional purpose in the mode prescribed by the Constitution, it holds the property as a sovereign with all the attributes belonging to such an ownership. Its jurisdiction over the subject matter is exclusive, that of the State being ousted. It may legislate concerning it, for the preservation of peace and order within its boundaries as all legislative powers appertain to sovereignty. If, however, it acquire land either for a constitutional purpose or not, but not in the mode by the Constitution prescribed, it holds it as a corporation and not as a sovereign. In such a case every attribute of sovereignty is wanting. The State retains the sovereign rights of legislation and jurisdiction. The illustration is verified by the great law-giver in his opinion in McCulloch *vs.* Maryland, a portion of which has heretofore been quoted—"they are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

A single extract from the opinion of the Court delivered by Chief Justice Marshall in the case of the Schooner Exchange, 7 Cranch, 116, cited by the counsel for the United States will show how far it is an authority in his favor. "Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant. Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of a person who happens to be a prince, and that military force which supports and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern."

See United States *vs.* Wilder, 3 Sumner, 316.
Bynk de foro legatorum Ch., 3, 4.
Marstens on law of Nations, B., 5, s., 9.
Vattel, B., 2, s. 213.

Sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of Courts of Justice.

United States *vs.* Wilder, 3 Sumner, 317.

See also Dreux *vs*. Kennedy, 12 Robinson, (Louisiana), 489.
Brown *vs*. Huger, 21 How. 305.
Polack *vs*. Mansfield, 44 California, 36.
McConnell *vs*. Wilcox, 1st Scammon, (Ill.,) 344.
Same case 13, Peters 498.
Avery *vs*. Fox, 1st Abbotts U. S. Repts., 253.
Osborn *vs*. Bank of the United States, 9 Wheat, 738.
Meigs *vs*. McClung's Lessee, 9 Cranch, 11.
Grisar *vs*. McDowell, 6 Wallace. 363.
French *vs*. Bankhead, 11 Gratt., 136.
Bank of the United States *vs*. McKenzie, 2 Brockenborough 401.
Sterns *et als ads*. United States, 2 Paine 312.
The United States *vs*. Peters, 5 Cranch, 115.
Swasey *vs*. North Carolina Railroad Co., 1 Hughes 20.
Davis *vs*. Gray, 16 Wallace 203.

This question seems to have been set at rest at an early day in our judicial history by the decision of the Supreme Court of the United States in the case of Meigs *vs*. McClung's Lessee, 9 Cranch, 11. In this case, in an action of ejectment, brought to recover a tract of land which was claimed under a grant from the State of North Carolina, upon which the defendants resided, as officers and under the authority of the United States, which had a garrison there, and had erected works at an expense of thirty thousand dollars, one of the grounds of the defense was, because the land was occupied by the United States troops, and the defendants, as officers of the United States for the benefit of the United States, and by their direction. Chief Justice Marshall in delivering the opinion of the Court in that case, says: "The "fact that the agents of the United States took possession of the land "lying above the mouth of the Highwassie, erected expensive build-"ings thereon, and placed a garrison there, can not be admitted to "give an explanation to the treaty which would contradict its "plain words and obvious meaning. The land is certainly the "property of the plaintiff below, and the United States can not "have intended to deprive him of it by violence and with-"out compensation. This Court is unanimously and clearly of opin-"ion that the Circuit Court committed no error in instruct-"ing the jury that the Indian title was extinguished to the land "in controversy, *and that the plaintiff below might sustain his action.*" I understand the court as deciding in that case, when they say that the plaintiff might maintain his action, that a party claiming title to land also claimed by the United States, may maintain his action of ejectment against their agents and officers holding possession of the land in controversy.

In French *vs.* Bankhead where the object was to recover the land upon which Fortress Monroe, a work which had cost the Government more than a million of dollars, was situated, no question was made as to the jurisdiction of the court to try the case, although the Government was represented by very distinguished counsel, one of whom (Joynes) was afterwards a Judge of the Supreme Court of Appeals of Virginia.

The counsel for the United States have cited the case of Osborn *vs.* United States Bank, 9 Wheaton, 738. For the defendant in error it is confidently but respectfully submitted that in that case will be found the enunciation of principles which should govern and control this case in his favor.

At page 838, Chief Justice Marshall speaking for the Court, says:— "In examining this question, it is proper that the Court should con- "sider the real case, and its actual circumstances. The original bill "prays for an injunction against Ralph Osborn, Auditor of the State "of Ohio, to restrain him from executing a law of that State, to the "great oppression and injury of the complainants, and to the destruc- "tion of rights and privileges conferred on them by charter, and by "the Constitution of the United States. The true inquiry is, whether "an injunction can be issued to restrain a person, who is a State officer "from performing any official act enjoined by statute; and whether a "court of equity can decree restitution, if the act be performed." Again at page 842: "If the State of Ohio could have been made a "party defendant it can scarcely be denied that this would be a strong "case for an injunction. The objection is, that, as the real party "cannot be brought before the Court, a suit cannot be sustained "against the agents of that party; and cases have been cited to shew "that a court of chancery will not make a decree, unless all those who "are substantially interested be made parties to the suit.

"This is certainly true when it is in the power of the plaintiff to "make them parties; but if the person who is the real principal, the "person who is the true source of the mischief, by whose power, and "for whose advantage, it is done, be himself above the law, be exempt "from all judicial process, it would be subversive of the best established "principles to say that the laws could not afford the same remedies "against the agent employed in doing the wrong, which they would "afford against him, could his principal be joined in the suit."

Page 845. "We think it a case in which a court of equity ought "to interpose, and that there are several grounds on which its jurisdiction may be placed."

Page 846. "The bill is brought, it is said for the purpose of protecting the bank in the exercise of a franchise granted by a law of "the United States, which franchise the State of Ohio asserts a right "to invade, and is about to invade. It prays the aid of the court to "restrain the officers of the State from executing the law. It is, then, "a controversy between the bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The "process of the court, though not directed against the State by name, "acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form against the State, and the "court ought not to proceed without making the State a party. If "this cannot be done, the court can not take jurisdiction of the "cause.

"The full pressure of this argument is felt, and the difficulties it "presents are acknowledged. The direct interest of the State in the "suit, as brought, is admitted; and had it been in the power of the "bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the court. But this "was not in the power of the bank. The eleventh amendment of the "constitution has exempted a State from the suit of citizens of other "States, or aliens; and the very difficult question is to be decided, "whether, in such a case, the court may act upon the agents employed "by the State, and on the property in their hands." He then demonstrates that the action could be maintained, and the court so decided.

But there is another view of this interesting question. It is, that the Constitution of the Union confers jurisdiction upon the Federal Courts in *all* cases arising under the Constitution, the Laws of the United States and Treaties made under their authority. It is well understood that jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority. This clause extends the jurisdiction of the

Court to all the cases described, without making any exception whatever and without any regard to the condition of the party. In the second class, the jurisdiction depends entirely on the character of the parties, if any of the parties enumerated *are* parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union. The case at bar is one of the *first* class, arising as it does under an act of Congress, and the court has jurisdiction on account of the character of the cause, irrespective of the condition or character of the party. Chief Justice Marshall, in discussing this provision of the Constitution in Osborn *vs.* The Bank of the United States, 9 Wheaton, says at page 855:

> "In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is "controversies to which the United States shall be a party." Does this provision extend to cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?
>
> Let us examine this question.
>
> Suits brought by the Postmaster-General are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the Courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the Court jurisdiction over them, as being cases arising under a law of the United States."

Here there is an instance where the jurisdiction of the Court was extended to a case in which the United States was interested, not on account of the character of the parties, but because of the subject matter of the controversy, it was a case arising under a law of the United States. That clause of the second section of the third article of the constitution, may then be said, in conferring jurisdiction upon the Federal Courts, to embrace cases in which the United States is interested, irrespective of the character of the parties to the suit.

In Cohens *vs.* Virginia, 6 Wheaton, 383—Chief Justice Marshall said for the court:

"We think a case arising under the constitution or laws of the "United States, is cognizable in the courts of the Union, whoever "may be the parties to that case." And again at page 392, "we think "that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever "may be the parties." And at page 404, "we find this tribunal invested with appellate jurisdiction in *all* cases arising under the "constitution and laws of the United States. We find no exceptions "to this grant, and can not invent one."

And the same great Judge in that case gave an illustration of the judicial power of the Federal tribunals, in a case arising under a treaty, even where a sovereign State would be a party, that is as great an exercise of jurisdiction, as that contended for in the case at bar. He "says: "If the property confiscated be debts, our own experience in-"forms us that the remedy of the creditor against his debtor remains. "If it be land, which is secured by a treaty, and afterwards confis-"cated by a State, the argument does not assume that this title, thus "secured, could be extinguished by an act of confiscation. The in-"jured party, therefore, has his remedy against the occupant of the "land for that which the treaty secured to him, not against the State "for money which is not secured to him." The case supposed arose under a treaty, and the action was against the party in possession, the title having passed to the State by confiscation. The case at bar arises under an act of Congress, is against the party actually occupying the premises, the Government claiming title by purchase under its own sale for direct taxes. It is difficult to see any material difference in the two cases.

The jurisdiction of this Court must be determined by the character of the parties to the record, and not by the character of the parties in interest. This proposition is so fully sustained by the case of Osborn *vs.* Bank of the United States that an extract from the opinion in that case, will be alone used to support it.

Page 852. "In cases where a State is party on the record, the "question of jurisdiction is decided by inspection. If jurisdiction "depend not on this plain fact, but on the interest of the State, what "rule has the constitution given, by which this interest is to be meas-"ured? If no rule be given, is it to be settled by the Court? If so, "the curious anomaly is presented, of a court examining the whole "testimony of a cause, inquiring into, and deciding on, the extent of "a State's interest, without having a right to exercise any jurisdiction "in the case. Can this inquiry be made without the exercise of juris-"diction?"

Page 856. "The judicial power of the Union is also extended to
"controversies between citizens of different States; and it has been
"decided that the character of the parties must be shown on the
"record. Does this provision depend on the character of those
"whose interest is litigated, or of those who are parties in the record?
"In a suit, for example, brought by or against one executor, the
"creditors or legatees of his testator are the persons really concerned in
"interest; but it has never been suspected that if the executor be a
"resident of another State, the jurisdiction of the Federal Courts
"could be ousted by the fact that the creditors or legatees were citizens
"of the same State with the opposite party. The universally received
"construction in this case is that jurisdiction is neither given nor
"ousted by the relative situation of the parties concerned in interest,
"but by the relative situation of the parties named on the record.
"Why is this construction universal? No case can be imagined,
"in which the existence of an interest out of the party on the record
"is more unequivocal that in that which has been just stated.
"Why, then, is it universally admitted that this interest in no manner
"affects the jurisdiction of the Court? The plain and obvious answer
"is, because the jurisdiction of the Court depends, not upon this in-
"terest, but upon the actual party on the record.

"Were a State to be the sole legatee, it will not, we presume, be
"alleged that the jurisdiction of the Court, in a suit against the ex-
"ecutor, would be more affected by this fact, than by the fact that any
"other person, not suable in the Courts of the Union, was the sole
"legatee. Yet in such a case the Court would decide directly and im-
"mediately on the interest of the State.

"This principle might be further illustrated by showing that juris-
"diction, when it depends on the character of the party, is never con-
"ferred in consequence of the existence of an interest in a party not
"named; and by showing that under the distributive clause of the 2d
"section of the 3rd article, the Supreme Court could never take orig-
"nal jurisdiction, in consequence of an interest in a party not named
"in the record.

"But the principle seems too well established to require that more
"time should be devoted to it. It may, we think, be laid down as a
"rule which admits of no exception, that, in all cases where jurisdic-
"tion depends on the party, *it is the party named in the record.*"

The following seem to be the plain results of the foregoing authorities and reasoning.

First—The Government holds Arlington as an individual, and not as a sovereign.

Second—A suit may be maintained against the officers or agents of the Government in possession of the land, the title to which is claimed by the Government.

Third—The question of jurisdiction must be determined by the parties to the record, and as the United States is not a party to the record, the Court has jurisdiction.

Fourth—If the Court should determine to test its jurisdiction by the character of the parties in interest, though not parties to the record, it has jurisdiction, even though the United States be the party in interest, *for this is a case arising under a law of Congress*, and in such a case, the Constitution by its express terms gives it jurisdiction, irrespective of the character of the parties.

Special attention is called to the language of the Supreme Court of Massachusetts in the case of Briggs *vs.* The Light Boats so much relied upon by the counsel for the Government. The Court at page 163 of 11 Allen, say:

"These are not suits against public officers merely, but are brought against the Government itself, as directly as any legal proceeding could be to assert a title or lien in, or obtain possession of, specific property. The United States were alleged in the petitions to be the owners of the vessels. The Statutes of the Commonwealth require, and these petitions pray, that notice should issue to them, 'that they may appear and answer thereto.' It is pursuant to such a notice that they have appeared and pleaded to the jurisdiction."

And again—"No other person was named in the petitions or has appeared in Court, as a defendant."

The United States was a party to the record; the only defendant; the suit was directly against the United States. These facts constitute it a totally different case from the one at bar. Here the United States is not a party to the record—is not a defendant, and the suit is against individuals.

The counsel for the Government have cited Barclay *vs.* Russell, 3 Vesey, 436. Attention is called to Dolder *vs.* The Bank of England, 10 Vesey, Jr., 352, as maintaining a contrary doctrine. In the latter case a motion to make the Attorney-General a party was granted by Lord Eldon.

Attention is called to the recent decision of the Supreme Court of California in the case of King *vs.* La Grange, a statement of which is to be found in "The Reporter," October 4, 1882, at page 428.

The defendant in error had verdict and judgment in his favor in the Court below.

Respectfully submitted,

FRANCIS L. SMITH,

Of Counsel for Defendant in Error.

FILED
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16-196

In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
G. W. P. C. LEE, DEFENDANT IN ERROR.
No. 219.

FREDERICK KAUFFMAN AND R. P. STRONG,
PLAINTIFFS IN ERROR,
vs.
G. W. P. C. LEE, DEFENDANT IN ERROR.
No. 220.

BRIEF FOR PLAINTIFFS IN ERROR.

the fortification. The suit was first brought in a State court, but before trial was removed to the circuit court of the United States. After such removal and before the trial, the Attorney-General of the United States filed a suggestion, that the property in question was occupied by the United States for governmental purposes, was being used by them as a cemetery and as a fortification, and was claimed by them as their property, under a title of record which was a conveyance in pursuance of a sale made under the act of 1862, and the amendments thereto, for the collection of direct taxes and for other purposes, which conveyance was set forth in full in such suggestion (p. 23); demurrer was filed to such suggestion, and upon argument this demurrer was overruled (p. 60).

The proceedings under which the conveyance relied upon by the United States was made, were under acts of Congress, as follows:

An act was passed August 5, 1861, imposing a direct tax of twenty millions of dollars. It being found that, by the means provided therein, the sums apportioned to the insurrectionary States could not be collected, on the 7th of June, 1862, was passed "An act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes." This act provided for the appointment of a board of three tax commissioners to execute the provisions of the law, and declared the principles upon which the different parcels of property should be assessed by such commissioners, making the tax and a penalty of 50 per cent. a lien upon the property, and providing that the owner of lands could discharge such lien by a payment of the tax within sixty days after the amount should be so fixed by the said commissioners.

Section 4 enacted as follows:

> That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.

Section 7 of such act, as amended by the act of February 6, 1863, after providing that in case of default of payment of the taxes the board of commissioners should advertise the property for sale, for at least four weeks, and at the time and place of sale should cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on said tax pursuant to said notice, proceeded as follows:

> In all cases where the owner of said lots or parcels of ground shall not on or before the day of sale *appear in person* before the said board of commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum, and in that case the same should be struck off to the highest bidder, who shall upon paying the purchase money in gold and silver coin, or in the treasury notes of the United States, or in United States notes, or in certificates of indebtedness against the United States, be entitled to receive from said commissioners their certificate of sale, which said certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of said sale and of the title of the said purchaser or purchasers under the same. * * *
>
> And provided further, that at such sale any tracts, parcels, or lots of land which may be selected under the direction of the President for government use for war, military, naval, revenue, charitable, educational, or police purposes, may, at said sale, be bid in by said

In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR, *vs.* G. W. P. C. LEE, DEFENDANT IN ERROR.	No. 219.
FREDERICK KAUFFMAN and R. P. STRONG, PLAINTIFFS IN ERROR, *vs.* G. W. P. C. LEE, DEFENDANT IN ERROR.	No. 220.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

This is a writ of error to the circuit court of the United States for the eastern district of Virginia. The action (ejectment) was originally brought against Kauffman and Strong, and about one hundred and seventy-five other persons, for the purpose of recovering the property known as the Arlington estate, in the county of Alexandria, Virginia, now occupied by the United States as a cemetery and as a fortification. Kauffman was superintendent of the cemetery, and Strong was in command of the fortification. The suit was first brought in a State court, but before trial was removed to the circuit court of the United States. After such removal and before the trial, the Attorney-General of the United States filed a suggestion, that the property in question was occupied by the United States for governmental purposes, was being used by them as a cemetery and as a fortification, and was claimed by them as their property, under a title of record which was a conveyance in pursuance of a sale made under the act of 1862, and the amendments thereto, for the collection of direct taxes and for other purposes, which conveyance was set forth in full in such suggestion (p. 23); demurrer was filed to such suggestion, and upon argument this demurrer was overruled (p. 60).

The proceedings under which the conveyance relied upon by the United States was made, were under acts of Congress, as follows:

An act was passed August 5, 1861, imposing a direct tax of twenty millions of dollars. It being found that, by the means provided therein, the sums apportioned to the insurrectionary States could not be collected, on the 7th of June, 1862, was passed "An act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes." This act provided for the appointment of a board of three tax commissioners to execute the provisions of the law, and declared the principles upon which the different parcels of property should be assessed by such commissioners, making the tax and a penalty of 50 per cent. a lien upon the property, and providing that the owner of lands could discharge such lien by a payment of the tax within sixty days after the amount should be so fixed by the said commissioners.

Section 4 enacted as follows:

That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.

Section 7 of such act, as amended by the act of February 6, 1863, after providing that in case of default of payment of the taxes the board of commissioners should advertise the property for sale, for at least four weeks, and at the time and place of sale should cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on said tax pursuant to said notice, proceeded as follows:

In all cases where the owner of said lots or parcels of ground shall not on or before the day of sale *appear in person* before the said board of commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum, and in that case the same should be struck off to the highest bidder, who shall upon paying the purchase money in gold and silver coin, or in the treasury notes of the United States, or in United States notes, or in certificates of indebtedness against the United States, be entitled to receive from said commissioners their certificate of sale, which said certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of said sale and of the title of the said purchaser or purchasers under the same. * * *

And provided further, that at such sale any tracts, parcels, or lots of land which may be selected under the direction of the President for government use for war, military, naval, revenue, charitable, educational, or police purposes, may, at said sale, be bid in by said commissioners, under the direction of the President, for, and struck off to the United States; and provided further, that the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act. (12 Stat., 640.)

II.

The statutes of Virginia material to be considered here are to be found in Chap. 131 of the code of 1873, as follows:

SEC. 1. The action of ejectment is retained, and may be brought as heretofore, subject to the provisions hereinafter contained.

2. It may also be brought in the same cases in which a writ of right may now be brought, and by any person claiming real estate in fee or for life, or for years as heir, devisee, or purchaser, or otherwise.

3. Every such action shall be brought in the circuit, county, or corporation court of the county or corporation in which the real estate or some part thereof is.

4. No person shall bring such action unless he has, at the time of commencing it, a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest, or portion thereof.

5. The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein, at the commencement of suit. If a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in the place of his lessee.

6. The action shall be commenced by the service of a declaration in which the name of the real claimant shall be inserted as plaintiff, and all the provisions of law concerning a lessor of a plaintiff shall apply to such plaintiff.

7. It shall be sufficient for the plaintiff to aver in his declaration that, on some day specified therein (and which shall be after his

title accrued), he was possessed of the premises claimed, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises thereof, to his damage, such sum as the plaintiff shall state.

8. The premises claimed shall be described in the declaration with convenient certainty, so that, from such description, possession thereof may be delivered.

9. The plaintiff shall also state whether he claims in fee or for his life, or the life of another, or for years, specifying such lives or the duration of such term, and when he claims an undivided share or interest, he shall state the same.

10. The declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count and separately in others.

11. To such declaration there shall be subjoined a notice, in writing, by the plaintiff or his attorney, addressed to the defendant, and notifying him that the said declaration will be filed, on some specified rule day, in the clerk's office of the court in which the suit is to be prosecuted, or in court, on some day in the next term of said court. Such declaration and notice shall be served in the same manner as other notices.

12. Upon filing the declaration with proof of the service of notice thereof as aforesaid, the plaintiff shall be entitled to a rule upon the defendant to appear and plead at the next rule day, if the declaration be filed at rules, or if filed in court to appear and plead within such time as shall be prescribed by the court; and if, upon service of such rule, he shall fail so to appear and plead, his default shall be entered and judgment given against him.

13. The defendant may demur to the declaration, as in personal actions, or plead thereto, or do both; but he shall plead the general issue only, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration. Upon such plea the defendant may give the same matter in evidence, and the same proceedings shall be had as upon a plea of not guilty in the present action of ejectment, except as herein otherwise provided, and he may also give in evidence any matter which, if pleaded in the present writ of right, would bar the action of the plaintiff.

14. The consent rule heretofore used is abolished. The plaintiff need not prove an actual entry on or possession of the premises

demanded, or receipt of any profits thereof, nor any lease, entry or ouster, except as hereinafter provided. But it shall be sufficient for him to show a right to the possession of the premises at the time of the commencement of the suit.

15. If the action be by one or more tenants in common, joint tenants, or coparceners, against their cotenants, the plaintiff shall be bound to prove actual ouster, or some other act amounting to total denial of the plaintiff's right as cotenant.

16. If the action be against several defendants, and a joint possession of all be proved, and the plaintiff be entitled to a verdict, it shall be against all, whether they pleaded separately or jointly.

17. If the action be against several defendants, and it appear on the trial that any of them occupy distinct parcels in severalty or jointly, and that the other defendants possess other parcels in severalty or jointly, the plaintiff may recover several judgments against them for the parcels so held by one or more of the defendants separately from others.

18. The plaintiff may recover any specific or any undivided part or share of the premises, though it be less than claimed in the declaration.

19. In a controversy affecting real estate, possession of part shall not be construed as possession of the whole when an actual adverse possession can be proved.

* * * * * * *

23. If the jury be of opinion for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof or claimed title thereto at the commencement of the action.

24. Where any plaintiff appears to have no such right, the verdict as to such plaintiff shall be for the defendants.

25. When the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally specified in the declaration, but if it be proved to only a part or share of the premises, the verdict shall specify such part particularly, as the same is proved, and with the same certainty of description as is required in the declaration.

26. If the verdict be for an undivided share or interest in the premises claimed, it shall specify the same, and if for an undivided share or interest of a part of the premises, it shall specify such share or interest, and describe such part as before required.

27. The verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term.

* * * * * * *

29. The judgment for the plaintiff shall be that he recover the possession of the premises according to the verdict of the jury, if there be a verdict, or if the judgment be by default or on demurrer, according to the description thereof in the declaration.

* * * * * * *

38. No writ of right, writ of entry, or writ of formedon shall be brought after the commencement of this act.

III.

Upon the trial, exceptions were taken to the following rulings of the court:

1st. Before the jury was sworn the defendants offered to file a disclaimer of title to the property, which the court refused to allow (p. 72).

2d. The plaintiff to maintain his title after having given evidence tending to prove possession of Geo. W. P. Custis of the property for many years, and that the original will was lost, offered in evidence the probate of his will made before the county court of the county. Objection was made to this as not proper evidence, and upon the ground that the contents of the will should be proved by witnesses according to the law (p. 76). These objections were overruled and the probate of the will allowed. This was the only proof of such will.

3d. The court allowed Hawxhurst, who was called by the defendants to identify the tax deed as the deed made by himself and the other parties to it as commissioners, to be examined by the plaintiff, on his cross-examination, as to the recitals in such deed; upon which he testified that no money was paid by the United States for such property (pp. 86, 87).

4th. In order to show what the practice of the commissioners was in receiving taxes when tendered by parties other than the owners in person at the time and before the sale of the property in question, the court allowed proof of the practice of such commissioners *after* the time of such sale (pp. 90, 91, 94).

5th. Such practice was allowed to be proved by declarations made to witnesses by such commissioners, both before and after the sale of this property (p. 94).

6th. The court charged the jury that if the defendants were in the occupation of the property merely as officers of the United States, though they made no claim thereto, and though the United States claimed it as its property under a conveyance of record and were in the actual use of it for governmental purposes, such occupation would not prevent the recovery by the plaintiff (pp. 103, 104).

7th. The court refused to charge the jury, at the request of the defendants, that if they found that the property in question was in the possession of the United States through their officers or agents under a claim of record title valid upon its face, and was being used by the United States for governmental purposes, that the suit could not be maintained by the plaintiff (pp. 105, 121).

8th. The court refused to charge the jury, at the request of the defendants, that the United States had the right to bid in the property at the sale made for taxes, unless the owner of such property appeared in person before the sale and offered to pay the tax, or requested the same to be struck off to a third person (p. 105).

9th. The court charged the jury that if they found that any time after the advertisement and before the sale, a person not having any interest in the property, appeared and offered to pay the tax thereon, and the commissioners refused to receive it because not tendered by the owner in person, a sale thereafter for the non-payment of such tax was thereby invalidated (pp. 105, 106).

10th. The court charged the jury that whether such tender of tax was, or was not, made by any person after advertisement and before the sale, if the jury believed that it was the invariable rule and practice of the commissioners after such advertisement and before the time of the sale of this property not to receive the taxes assessed against property unless tendered by the owner in person, the fact of such general rule and practice would render the sale of this property void (p. 105).

11th. The court charged the jury, that such a general rule and practice would render a sale void, even though the jury found from the evidence that the owner or owners of this property would not at any time before the surrender of General Lee in 1865 have approved a tender of payment of taxes by any person (p. 107).

12th. The court refused the request of the defendants to charge the jury that a general rule or practice of the commissioners not to receive the tax when tendered by any person other than the owner in person after the advertisement and before the sale, did not absolve the owner or owners from offering to pay the tax either in person or by an agent within the time specified, in order to discharge the land from the tax (p. 107).

13th. The court refused the request of the defendants to charge the jury that mere prior possession, under the circumstances of this case (reciting them) was not sufficient evidence of legal title without showing an adverse possession of fifteen years with color of title (pp. 107, 108).

4th. In order to show what the practice of the commissioners was in receiving taxes when tendered by parties other than the owners in person at the time and before the sale of the property in question, the court allowed proof of the practice of such commissioners *after* the time of such sale (pp. 90, 91, 94).

5th. Such practice was allowed to be proved by declarations made to witnesses by such commissioners, both before and after the sale of this property (p. 94).

6th. The court charged the jury that if the defendants were in the occupation of the property merely as officers of the United States, though they made no claim thereto, and though the United States claimed it as its property under a conveyance of record and were in the actual use of it for governmental purposes, such occupation would not prevent the recovery by the plaintiff (pp. 103, 104).

7th. The court refused to charge the jury, at the request of the defendants, that if they found that the property in question was in the possession of the United States through their officers or agents under a claim of record title valid upon its face, and was being used by the United States for governmental purposes, that the suit could not be maintained by the plaintiff (pp. 105, 121).

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11th. The court charged the jury, that such a general rule and practice would render a sale void, even though the jury found from the evidence that the owner or owners of this property would not at any time before the surrender of General Lee in 1865 have approved a tender of payment of taxes by any person (p. 107).

12th. The court refused the request of the defendants to charge the jury that a general rule or practice of the commissioners not to receive the tax when tendered by any person other than the owner in person after the advertisement and before the sale, did not absolve the owner or owners from offering to pay the tax either in person or by an agent within the time specified, in order to discharge the land from the tax (p. 107).

13th. The court refused the request of the defendants to charge the jury that mere prior possession, under the circumstances of this case (reciting them) was not sufficient evidence of legal title without showing an adverse possession of fifteen years with color of title (pp. 107, 108).

14th. After the testimony was closed, and after several prayers for instructions had been passed upon by the court, a nonsuit was permitted to be entered by the plaintiff as to all the defendants but Kauffman and Strong, provided the plaintiff could read in evidence an affidavit made by said Strong for the purpose of removal of the cause from the State to the United States court, which the court allowed (pp. 108, 111, 112).

15th. The court then refused the request of the said defendants, Kauffman and Strong, to charge the jury that if they found that the parties in whose favor the nonsuit had been entered occupied distinct parcels of the property in question in severalty or jointly, and distinct from the said defendants Kauffman and Strong, a verdict could not be given against said Kauffman and Strong for the property so held by said defendants in whose favor such nonsuit had been entered (p. 121).

16th. The court charged the jury at the request of the plaintiff that if the land or any part thereof was under the charge and in the occupation or possession of the defendants Strong and Kauffman or either of them, under the direction of the Government of the United States or of any department or officer thereof, such possession was sufficient to maintain this action (p. 121).

IV.

ASSIGNMENTS OF ERROR.

The court erred as follows, to wit:

1. In sustaining the demurrer to the suggestion of the Attorney-General, and in permitting the suit to be prosecuted and maintained after it appeared that the United States was in possession of the property through its officers and agents using it for governmental purposes under a claim of title of record valid upon its face (pp. 103, 104, 105, 121).

2. In giving to the jury the following instruction:

If the jury believe from the evidence that at the institution of this suit the premises in controversy were, or that any part thereof was, under the charge and in the occupation or possession of the defendants Strong and Kauffman, or either of them, under the direction of the Government of the United States, or of any department or officer thereof, then such occupation or possession is sufficient to enable the plaintiff to maintain his action against them respectively for the premises so occupied or possessed by them respectively (p. 121).

3. In refusing the defendant's request for the instruction:

If the jury believe from the evidence that the United States is in the possession of the property in controversy, through its officers and agents charged with the control of the same; that the defendants occupy the same only as such officers and agents in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession thereof except as such officers; that the United States is using the same as a national cemetery for the burial of deceased soldiers, and as a fort and reserve connected therewith, claiming title thereto under the certificate of sale proved in this cause, then the verdict must be for the defendants (p. 121).

4. In refusing the following instruction:

If the jury believe from the evidence that a portion of the property in question not occupied by the United States as a cemetery, and not occupied by any of the defendants other than R. P. Strong, has been for a period of five or more years, and up to and including the time of the commencement of this suit, used by the Government of the United States as a fort or a military reservation, or as a military fort and reserve connected therewith; that the said defendant R. P. Strong at the commencement of the suit occupied the same as a military officer of the United States, and under orders of the War Department of the United States only, and as the commander of soldiers and officers of the the United States occupying the property with him, and was charged with the possession and occupation of the same as such officer, and only as such; that during this period the United States has claimed to hold the same amount of the taxes fixed thereon by the commissioners (within the time prescribed by law) in order to discharge the land from the tax (p. 107).

9. In refusing to instruct the jury as follows:

If the jury believe from the evidence that the owner of the property did not at or before the sale on the 11th day of January, 1864, authorize or direct any person to pay or offer to pay the tax assessed upon the property, and if they further believe from the evidence that any payment of such tax, or offer to make payment thereof, would at that time, and until the surrender of General Lee, in April, 1865, have been disapproved by the owners had it come to their knowledge, then a refusal by the commissioners to receive payment of such taxes from any person not so authorized, after the advertisement and before the sale, would not invalidate the title of the United States appearing by the certificate of sale produced by the defendants, nor would a general refusal to receive taxes, except from the owner in person, during such period invalidate such sale (p. 107).

10. In refusing to instruct the jury as follows:

If the jury believe that the owner of said land in controversy did not, on or before the day of sale, appear in person before the board of commissioners and pay the amount of the tax upon said land, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said lot or parcel of ground; that the said tract of land was selected under the direction of the President of the United States for government use, for war, military, naval, revenue, charitable, educational, or police purposes, and that the President directed the said commissioners to bid in the said property at said sale, then the said commissioners were, at such sale, if the jury believe the same was lawfully made, authorized to bid on the said property, under the direction of the President, for and to strike off the same to the United States (p. 105).

11. In admitting evidence of the general rule and practice of the board of commissioners in not receiving tax from parties other than owners in person at a period posterior to the sale in question, in order to show such

rule, &c., *at that sale*, and also in admitting evidence of the declarations of the commissioners as to such rule, &c., made both before and after the sale, as evidence, where there was no case before them, and without reference to any particular case (pp. 91, 92, 94, 95).

12. In refusing to instruct the jury as follows:

If the jury believe from the evidence that the defendants named in the declaration in this cause, other than the defendants Strong and Kauffman, or any of them, or any other persons, occupied a part of the premises in controversy at the commencement of this suit, in severalty or jointly, in a parcel or parcels, distinct from said defendants strong and Kauffman, or either of them, then the jury cannot find a verdict for the plaintiff against said Strong and Kauffman, or either of them, for such parcels not occupied by said Strong or Kauffman, and in such case, and in case a verdict is found against said Strong and Kauffman, or either of them, for a portion of the property, the verdict shall specify such part particularly with the same certainty of description as is required in the declaration, and if the jury cannot ascertain such part from the evidence, so as to so describe it, the verdict must be for the defendants Strong and Kauffman (p. 121).

13. In refusing to instruct the jury as follows:

If the jury believe from the evidence that G. W. P. Custis, through whom the plaintiff claims, died in 1857; that the father and mother of the plaintiff left the property in question in May, 1861, and went into the Confederate lines; that the United States immediately thereafter took military possession thereof, and continued to hold such possession until the close of the war; that since January, 1864, the United States has held the same under color of title valid upon the face thereof and of record in the county of Alexandria; that neither the plaintiff nor those through whom he claims has held possession of any portion of said property since May, 1861; that the defendants came into possession thereof peaceably and quietly, without any privity between them and the plaintiff or those under whom he claims, then the plaintiff cannot recover upon the ground of prior possession of the plaintiff, or those through whom he claims, without proving an uninterrupted adverse possession of fifteen years under color of title, and mere prior possession of the person through whom he claims is not sufficient proof of a legal title to the land upon which alone this action can be sustained (pp. 107, 108).

V.

[It will be observed that the Attorney-General, without submitting to the jurisdiction of the court, suggested to the court on behalf of the United States that the property in question was in their possession under claim of title of record, and was being used by them for governmental purposes. A demurrer to this suggestion having been sustained, and a motion to dismiss having been denied, and the United States not having submitted to any further extent their rights to the jurisdiction of the court, and being in no other sense a party to the record, and a final judgment having been rendered upon the case presented by the United States, the question might arise as to whether the alleged error in sustaining such demurrer could be properly considered unless the United States themselves sued out a writ of error. Out of abundant caution, therefore, such writ was sued out. So that there are now two cases upon the docket of court, one *The United States* vs. *Lee*, and the other *Kauffman and Strong* vs. *Lee*, requiring, however, but one record, and proper to be argued together.]

VI.

As to the first five assignments of error:

In view of the recent decision in the case of Carr *vs.* The United States (98 U. S., 433), where, in the explicit and at the same time comprehensive terms, it is declared that no court can have jurisdiction to try an ejectment case when it appears that the United States are in possession and are claiming title to the property in controversy, it seems unnecessary to discuss the questions thus presented at length, but as this case is both notable and important, and as the elaborate opinion of the learned court below (pp. 31 to 60) proceeds upon *distinctions*, which, in our view, threaten the integrity of the general doctrine in this class of cases, we may be excused for again going, to some extent, over the whole ground.

ARGUMENT.

The evidence showed without question that the property in controversy was in the possession of the United States through their officers and agents, under a claim of title of record, valid upon its face, and that it was being used for proper and necessary governmental purposes. This record title was a certificate of sale, under the act of Congress of June 7, 1862, and the amendment thereto, relating to the collection of direct taxes. (See above, pp. 2, 3, 4.) In Bennett *vs.* Hunter (9 Wall., 336), this court says, in reference to such a sale: "The sale was the public act, which was the equivalent of office found." The mode of proceeding by the United States is justified by the rule in Legh *vs.* Roe (8 Meeson & Welsby, 579). Also by the following cases: The Exchange (7 Cranch, 117); Maxwell's Lessee *vs.* Levy (2 Dallas, 381); Florida *vs.* Georgia (17 How., 478).

The object of the suit is to recover possession from the United States, and can be maintained only by invalidating this record title of the United States. It is therefore, in substance, a controversy between Lee on one side, and the United States on the other. The defendants below did not claim title, but, on the contrary, disclaimed it.

An analysis of the action of ejectment shows that it is substantially a proceeding against the *property* rather than against the nominal parties. As Lord Mansfield said, in Fairclaim *vs.* Shamtitle, 3d Burrows' Rep., 1292: "In form, it appears as a trick between two to dispossess a third by a sham suit and judgment." Nevertheless the proceeding is substantially *in rem*, for the thing itself, *the term*, is recovered, with nominal damages, but not the mesne profits." (Runnington on Ejectment, p. 4.)

Whilst by the statutes of Virginia the *form* of proceedings is changed by making the actual occupants the parties defendant, yet, the revisers "have carefully adhered to the leading principles of the action." The statute provides that the verdict shall ascertain the nature of the estate, and that "the judgment for the plaintiff shall be that he recover the possession of the premises, according to the verdict of the jury." (Secs. 27, 29, above quoted.)

Although a judgment will not be binding upon the United States, they not being parties, yet the result of the judgment for the plaintiff will be *process* to divest the United States of possession, which they cannot again obtain except by another suit in ejectment, in which they will be plaintiffs. It thus really affects persons who are interested in the title, though not parties. The real object is to remove the hands of the United States. It is the title, interest, and possession of the United States which is attacked.

Although officers of the United States, acting under orders from the War Department, are in charge of the property as such, we submit that they are not "occupants" in the sense contemplated by the statute of Virginia.

"As the United States are not suable of common right, the party who institutes a suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction in it. Ejectment, therefore, cannot be brought against the United States any more than an action of assumpsit, and it seems to follow that they cannot be indirectly sued in the person of their agents or officers, and the title and claim thus subjected by indirection to the jurisdiction of the State courts. In theory it is unreasonable, and in practice it might prove mischievous by bringing the State and National authority in conflict." (People *vs.* Ambrecht, 11 Abbott's Pr., N. Y. Rep., 97, cited in Brightly's Digest, N. Y. Rep., p. 1177, as said to have been affirmed by the court of appeals of that State.)

A principle underlying all the authorities relating to the jurisdiction of courts, is that the sovereign power of any nation being supreme, is not amenable to the judicial department, and will not permit process against itself, either directly or indirectly, or allow its operations or instrumentalities to be affected or disturbed except by special consent. It cannot admit of coercion by judicial process. Hence the well-known proceedings at common law, by petition of right, and *monstrans de droit.* (Blackstone's Com., vol. 3, p. 236.)

Reference in this connection is made to the following English authorities: Sadler's case, 4 Coke's Rep., 55 *a;* Stamford on Prerogative, 72 *a, b*, 606; 6 Com. Digest, Title Pre., pp. 67, 64; Year Books, 3d ed., 171; The Bankers, 14 Howell's State Trials, pp. 28, 78, 81, 82; Barclay *vs.* Russell, 3 Vesey, 436; Mitford's Ch. Pleadings, 31; Hovenden *vs.* Lord Annesly, 2 Schoales & Lefroy, 617; 1 Anstruther Rep., 215; 5 Bacon's Abr., 569, 570.

"An ejectment will not lie for lands belonging to the crown of which the crown is in possession *by its officers;* the proper remedy is by petition of right." (Adams on Ejectment, p. 18.)

Special attention is called to the case of Legh *vs.* Roe (8 Meeson & Welsby, 579), where in ejectment a suggestion was made by the attorney-general, as in this case, whereupon a rule issued, and was made absolute, the doctrines now asserted being fully maintained. (See, also, Att'y-Gen. *vs.* Hallett, 15 Meeson & Welsby, 106.)

But this doctrine is as fully maintained in this country.

In No. 81 of the Federalist, the author says:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind.

In Cohens *vs.* Virginia (6 Wh., 264) the court say:

> A sovereign independent state is not suable except by its own consent. This general proposition will not be controverted. As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the courts cannot exercise jurisdiction over it.

(See, also, the elaborate discussion of general principles in Chisholm *vs.* Georgia, 2 Dallas; and U. S. *vs.* Clarke, 8 Peters, 444; also 6 Wall., 484; 9 Peters, 201; 1 Story's Eq. Pleadings, sec. 69 and note; Hill *vs.* U. States, 9 How., 389; Reeside *vs.* Walker, 11 How., 290.)

It is no doubt true that courts sometimes have jurisdiction in cases between individuals, although the sovereign power may be indirectly interested. We are not called upon to lay down a general rule by which to distinguish between such cases as are, and such as are not within such jurisdiction. It will be sufficient for us to show that *ejectment cases* are within the latter class.

For this purpose, reasoning employed in judgments upon *prize* cases is pertinent:

In The Siren (7 Wall., 152), this court, after a statement of the general doctrine, say:

> This doctrine of the common law is equally applicable to the supreme authority of the nation—the United States. The same

agents or officers, and the title and claim thus subjected by indirection to the jurisdiction of the State courts. In theory it is unreasonable, and in practice it might prove mischievous by bringing the State and National authority in conflict." (People *vs.* Ambrecht, 11 Abbott's Pr., N. Y. Rep., 97, cited in Brightly's Digest, N. Y. Rep., p. 1177, as said to have been affirmed by the court of appeals of that State.)

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For this purpose, reasoning employed in judgments upon *prize* cases is pertinent:

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> This doctrine of the common law is equally applicable to the supreme authority of the nation—the United States. The same

> exemption from judicial process extends to the *property* of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property.

Again, in The Davis (10 Wall., 15):

> No suit *in rem* can be maintained against the property of the United States, *when it would be necessary to take such property out of the possession* of the government by any writ or process of the court.

And,

> The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession.

In the latter case, jurisdiction was sustained on the ground that the proceedings to enforce the lien began, and the cotton was seized, *before the latter came to the possession of the officers of the United States:*

> Proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, *the possession of the United States must be invaded under process of the court.*

This principle is quite similar to that which forbids property in the hands of an officer of the government to be attached (4 How., 20; 9 Peters, 201), or property *in custodia legis* (6 Md., 1), or in the hands of the receiver of a court.

These principles are elaborately discussed in Briggs *vs.* The Light Boats, 11 Allen, 157; see, also, Case *vs.* Terrell, 11 Wall., 199.

The fact that the United States are *in possession* brings the present within the principles established by these cases.

But it makes the case still stronger that they claim by *a title of record*, i. e., by a *sale and certificate* which (9 Wall. 336) is the equivalent of office found, and so, valid upon its face. See 4 Coke's Rep., 55 *a*, Sadler's case; Stamf. Pre., 606; 6 Com. Dig., 67; The Bankers, 14 Howell's State Trials, pp. 28, 78, 81; also, Alexander *vs.* Greenup, 1 Munf., 134; and note in 2d American Decisions, 568.

More than that, the property is in government *use.* Final process, besides interfering with the possession, will seriously disturb the operations of the government. It will do much more than deprive the United States of *property.* A proceeding like this against *officers in charge of a fortification* is mentioned in Carr's case (98 U. S., p. 438) as a legal absurdity.

In Mississippi *vs.* Johnson (4 Wall., 475) this court would not allow a bill to be filed which called for an interference with the operations of the Executive department. See, also, Dobbins *vs.* Comrs., 16 Peters, 435; Day *vs.* Collector, 11 Wall.; McCulloch *vs.* Md., 4 Wh.; Harris *vs.* Dennis, 3 Peters, 292.

In the Opinion of the court below it is said that inasmuch as the title to this property was not acquired by the consent of the legislature of Virginia The United States hold the estate by *private* and not by sovereign tenure, and that therefore they have not the prerogatives of a sovereign to protect their possession.

The only effect of not obtaining the consent of the legislature in any case is that the United States do not obtain *exclusive jurisdiction.* But the United States are sovereign everywhere within their borders. Wherever they act it is as sovereign; they hold their property as exemption from judicial process extends to the *property* of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property.

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The only effect of not obtaining the consent of the legislature in any case is that the United States do not obtain *exclusive jurisdiction.* But the United States are sovereign everywhere within their borders. Wherever they act it is as sovereign; they hold their property as sovereign; all their operations are those of a sovereign power. They are not *foreign* to Virginia. They do not hold property there merely by the consent of Virginia.

In Kohl *vs.* The United States (91 U. S., 367), this court in speaking of the condemnation of real estate under the power of eminent domain, which is said to be the offspring of political necessity and inseparable from sovereignty, say:

> This power cannot be enlarged or diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment; such consent is needed only, if at all, for the transfer of jurisdiction and the right of exclusive legislation after the land shall have been acquired. (See also 6 Peters, 570, &c.)

The possession of the property now in question was obtained under an act of Congress passed *by virtue of the taxing power of the United States*, the highest exercise of a sovereign power, which expressly conferred upon its officers the power to purchase real estate for the government for the purposes enumerated by the law. In Elliott *vs.* Van Voorst (3 Wall., Jr.), the court, distinguishing between property held *for national*, for *other*, uses in the State, say: "The right of the government as a sovereign, and its prerogatives as such are co-extensive with the functions of government committed to it."

However, the strength of the present case is exhibited by recollecting that even if Virginia were a foreign government, and the United States exercised their prerogatives within its territory only by the consent of the State, the same principles would apply.

In Story's Equity Pleadings, sec. 69, the author says, after stating that where the interests of the Crown are involved or it is sought to divest or affect its rights, the proper mode is by petition of right:

A similar exemption from being sued applies to the case of foreign sovereigns, for they are not suable in the courts of a foreign country, although they may be found personally within the dominions of such foreign country.

In Wadsworth *vs.* The Queen of Spain (17 Q. B., 171), it was held that proceedings would not lie against the property of the Queen of Spain within the dominions of Great Britain.

This whole doctrine is reviewed in The Duke of Brunswick *vs.* The King of Hanover (6 Beav., 1), and also in the case of the Exchange (7 Cranch, 117) where all the questions relating to the jurisdiction of our courts over the property of foreign powers were carefully examined by Chief Justice Marshall, who held that they had none whatever, and especially where such property is held and used for national purposes. This case was decided upon a suggestion that the French Government was interested, and without its appearing from the record that it was a party to the suit. The same doctrine was applicable in Briggs *vs.* The Light Boats, 11 Allen, 177. (See, also, 7 Wh., 283; 20 How., 529.)

It will be observed that at the time that the Opinion upon this point was rendered in the court below the suit was pending against about 175 defendants, and as to the part outside of the cemetery limits and the fortification it was claimed that the land was occupied by parties who were not officers or agents of the United States, but merely their tenants, and that it was not in government use, this fact being dwelt upon by the court at considerable length. But before the close of the trial a nonsuit was suffered as to all but the commander of the fortification and the superintendent of the cemetery, and a verdict was rendered *for the whole property* against the latter by reason of their alleged occupation merely as officers of the United States. The case as now presented, therefore, is not against tenants merely or persons holding by permission of the United States for their own use, but against officers of the United States in charge for the United States, and in this respect is, therefore, precisely like the case of Carr *vs.* The United States (98 U. S., 433), and distinguishable from several of the cases cited in the Opinion just referred to.

It is admitted by the court below that in such a case as this "the old English action of ejectment would not lie" (p. 44). But it is claimed that under the statute of Virginia the right of property may be tried as in the case of the English writ of right. This, it is said, may be done without disturbing the possession, inasmuch as no entry is necessary at the outset as required in the English action of ejectment (pp. 44, 45). The court then comments upon several cases to show that the distinction between suits which may, and suits which may not, be brought against the property of the sovereign turns upon the circumstance whether the process to take possession issues anterior to, or as the result of, final judgment. In the former case the suit, as is said, is not maintainable, but in the latter it is. In such a case as this, it is added, under the Virginia statute, "the action may not only be commenced, but prosecuted to judgment, without any disturbance of the possession of the government or interference with its operations or even service of mandatory process upon its officers" (p. 45). This was the central idea, the "pivotal point," upon which the decision was placed.

However, we submit that the intention of the Virginia statute was not to authorize a court to try cases simply for the sake of determining *moot* questions of law, without power to enforce its judgment. This would indeed be *frustra!*

In Riggs *vs.* Johnson County (6 Wall., p. 187), it is said:

> Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that if the power is conferred to render the judgment or enter the decree it also includes the power to issue proper process to enforce such judgment or decree. * * * Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment.

The question of mere right, too, is one with which the parties defendant below have nothing to do. In fact, at the outset and before the jury was sworn they disclaimed all right. To try the abstract question of right when the party claiming it is not a party to the suit, and therefore could not be bound by the judgment, is a mere waste of time. For this reason a writ of right could not be maintained *against* a *tenant* nor *by* a *devisee.* 8 Cranch, 242, 244; 2 Leigh, 664; 1 Rob. Pr., 465, 474; 7 Wend., 250; 2 Sch. & Leif., 104; 2 Tucker's Com., 179; 2 Saunders, 451.

"If a writ of right be brought against one who is not tenant *of the freehold* the defendant may plead that he is not tenant, and disclaim the tenancy, upon which, if true, the judgment must be rendered in his favor as the demandant cannot recover that from him which he has not, but the judgment in such case is only that the tenant go thereof without day." 2 Tucker's Com., 180.

As to effect of a State statute upon ejectment in a

Federal court where the occupation is by authority of the United States, see Hooper *vs.* Scheimer, 23 How., 235.

In support of its decision the court below cites as the leading case, Osborn *vs.* The Bank (9 Wheaton, 738). There the great question—the others being mere questions of jurisdiction, form of action, authority to sue, &c., —was the constitutionality of an Ohio statute, the object of which was to impair one of the instrumentalities of the Government of the United States; and it was determined that such act was unconstitutional. In that case the property in controversy was in the possession and control of individuals. It had not come into the *possession and control* of the State of Ohio. The court had power to grant full relief by enforcing its process against the parties named in the record. The foundation of the bill was to enjoin the property from being passed over to the control of the State of Ohio, *whereby the remedy would be lost.* It recognized and rested upon the very principle for which we are contending, to wit, that the *possession* of sovereign power cannot be disturbed by judicial process. The State endeavored to defeat the jurisdiction by suggesting its interest in the property. To this the court say: "Where the right is in the plaintiff, *and the possession is in the defendant*, the inquiry cannot be stopped by the mere assertion of title in the sovereign." In regard to *such a case* it was that the court used the general expression, "the jurisdiction of the court depends not upon *this interest*, but upon the actual party upon the record." The substance of the case upon this point will be found to be, that while a suit could not have been maintained if the property had come into the possession of the State, yet it could be maintained to prevent it from coming into such possession, and that in such case the

State could not, *by merely asserting* an interest in the subject in controversy, without being a party to the record, defeat the suit.

As to the case of Swazy *vs.* The N. C. Railroad Company, 71 N. C. Rep., cited by the court below, a careful reading of the Opinion will show its leading principles to have been: 1st, that the property in controversy was in the possession of the company as a *depository*, and that therefore the power of the court could have full effect by operating upon the parties named; and, 2d, that the State, for the purpose of the enforcement of the trust, had *consented* to grant "the full power to use the machinery of the court."

So it has been held that by becoming a member of a corporation a State surrenders its prerogative of exemption so far as affected by suits against such corporation. This is the ground of the decision in several cases in which expressions are used apparently in conflict with our position.

Some authorities have been cited to show that this court has passed upon ejectment cases against officers of the United States without dismissing them for the want of jurisdiction:

One is Meigs *vs.* McClung (9 Cr., 11). But in that case the question of jurisdiction was not made. The court say: "The question on which the cause has been placed is this: Is the land claimed by the plaintiff in the court below within the ceded territory?"

So in United States *vs.* Peters (5 Cr., 115) it was held that the court had jurisdiction notwithstanding the interest and claim of ownership suggested by the

State. But Chief Justice Marshall puts the decision upon this ground:

> *Since, then*, the State of Pennsylvania *had neither possession* of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext that the case is within that amendment of the constitution which has been cited.

In Wilcox *vs.* Jackson (13 Peters, 498), the decision was in favor of the plaintiff in the State court, but upon a writ of error it was *reversed* by the Supreme Court. Here also the question of jurisdiction is not even mentioned.

In Hall *vs.* Gaines (22 How., 144), where the writ of error was to a State court, the court say:

> *To give jurisdiction to this court* the party must claim for *himself* and not for a third party, in whose title he has no interest. Setting up a title in the United States by way of defense is not claiming a personal interest affecting the subject of litigation. * * * If it were allowed to rely upon the United States title in this instance, the right might be decided against the government when it was no party and had not been sued. See also 1 Black, 472; 5 Cr., 344; 10 How., 311.

In Brown *vs.* Huger (21 How., 305), and Grisar *vs.* McDowell (6 Wall., 363), the cases came to this court upon bills of exception taken by the plaintiff in the court below, in none of which was reference made to this question of jurisdiction, and in neither case were the exceptions sustained. This question was not, therefore, before the court, and no allusion was made to it. It was not in the assignment of errors.

The same may be said of the case of Cooly *vs.* O'Conner (12 Wall., 391). Besides, in that case the United

States were not in possession of the property, nor was it in government use. None of these cases, therefore, have any binding authority upon this court.

There have been contradictory decisions in State courts upon this question, such as Dreux *vs.* Kennedy, 12 Rob., La. R., 502, in support of the jurisdiction, and The People *vs.* Ambrecht, 11 Abb. Pr., N. Y. Reports, against it. Of all, however, it may be said that the question of *record title* was not presented and passed upon.

It may further be said that none of them present all three of the prominent features of this case—possession, record title, and government use—nor in any of them has the question been raised, as in the present case, *by the sovereign itself*, the party whose interests are affected by the assumption of jurisdiction. In this case the sovereign has been careful to protect its interests, following therein the precedents in Legh *vs.* Roe, 8 Meeson & Welsby, 579, and in Florida *vs.* Georgia, 17 How., 478.

VII.

As to the *Sixth*, *Seventh*, *Eighth*, and *Ninth* assignments of error:

The act of 1863 provides that—

> The certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the act. 12 Stat., 647.

It will not be claimed that the property was not subject to taxes, or that it had been redeemed. If this proviso means anything, therefore, the certificate cannot be invalidated as evidence, except by showing payment of the taxes, or what is equivalent to such payment. This principle was recognized in Bennett *vs.* Hunter; for the opinion of the court closes by saying:

> The sale must be regarded in law as having been made after *the payment of the tax*, and as insufficient to vest the title to the land in the purchaser.

It was conceded by counsel in that case that a tender of taxes was equivalent to payment.

In the case of Tacey *vs.* Irwin, 18 Wall., 549, the court say: "The case is not distinguishable in principle from that of Bennett *vs.* Hunter." There a relative of the owner had gone to the office of the commissioners, and they *declined* to receive the tax from him, and so *informed* him. It is true that in this case the court state the general principle that it was not necessary for a formal tender to have been made, on account of the fact that the commissioners had made it their inviolable rule and practice not to receive the taxes, except from the owner in person; but this is clearly *obiter dictum*, for in that case application had been made to the commissioners, and they had expressly declined to receive the tax from the person who went to see about it. Besides, as we submit, this *obiter dictum* has since been overruled.

In Callonan *vs.* Hurley (93 U. S., 387), the court had under consideration a deed made under the tax law of Iowa, which provided that such deed should be conclusive evidence as to all the points except those therein specified, which are the same as in this act of Congress. Among the points made were these: That no taxes were levied, That they were not delinquent, That there was no person authorized to receive the tax, That the land was not subject to tax, and That there was a fraudulent combination to prevent bidding. In regard to these the court say:

> It is not open to the plaintiff to aver and prove any allegation he puts forward to establish the invalidity of the deeds except that the property was not subject to taxation, and that there was a fraudulent combination of the defendant with others to prevent bidding.
>
> If the act is to have any effect at all it is plain that the deeds cut off most of the averments upon which the plaintiff bases his attempt to obtain the relief he seeks.

Under a statute, therefore, almost identical with that now under consideration in respect to evidence admissible to affect the deed, these stringent provisions are strictly upheld by this court.

In De Treville *vs.* Smalls (98 U. S., 517) the court say: The acts of Congress "declared in effect that the certificate of the commissioners' sale shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or other of three things specified therein. There is no possible excuse for not enforcing such statutes according to their letter and spirit."

In Bennett *vs.* Hunter and in Tacey *vs.* Irwin there was either a tender of tax, or what was equivalent to a tender. It was reasonable to construe either act as equivalent to *payment* of the tax before sale. But in the present case the ruling of the court below went far beyond this. It held that in the absence of proof to the contrary *the law presumes* that the taxes would have been paid but for the rule not to receive taxes except from the owner in person (p. 69); that even though the jury might find that the existence of the rule had no tendency to prevent payment or tender, and that it was not in consequence of the rule that the taxes were not tendered, yet the mere existence of the rule made the sale void; and it refused to charge that the rule did not absolve the owner from paying or offering to pay either in person or by an agent, even though the jury should believe that the tender would not at the time have been approved, but would have been disapproved, by the owner.

The plaintiff was a prominent military officer under the Southern Confederacy until the close of the war; and the holder of the life estate at that time was the wife of General Robert E. Lee (p. 102), and the jury might have believed that they would not have approved the payment of money to the United States in aid of the war then being waged against such Confederacy. The only evidence of tender of the tax by any one is that by Johnson and Janney (pp. 95, 96, and 97), made to Foster; and therefore as Foster was not appointed until January 28, 1864, after the sale, it appears that the alleged tender was made *after the sale.*

Can such circumstances be considered *equivalent to payment?* If so, we submit that the rule goes beyond that established by the cases relied upon by the plaintiff.

However, it was upon such instructions as to the law that the jury decided this case.

VIII.

In support of the *Tenth* assignment of error we submit that the law makes a distinction between purchases made by private individuals, and by the United States; and that the case of Bennett *vs.* Hunter applies only to the former.

Section 7 of the act in relation to direct taxes, as originally passed in 1862, provided for a sale after default of payment within sixty days after assessment, and directed that at the time of sale the property be sold to the highest bidder for a sum not less than taxes, *penalty*, *costs*, and interest, and contained the following:

> And the said commissioners shall at said sale strike off the same severally to the United States at that sum unless some person shall bid the same or a larger sum. 12 Stat., p. 423 (middle).

In place of this, by the amended act of 1863, was inserted the following:

> In all cases where the owner of said lots or parcels of ground shall not on or before the day of sale *appear in person* before the said board of commissioners and pay the amount of said *tax* with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two thirds of the assessed value of, said several lots or parcels of ground, the said commissioners shall be authorized at said sale *to bid off the same for the United States* at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum; and in that case the same shall be struck off to the highest bidder. Supra, p. 3.

The amended section also provides for the purchase of the property, under direction of the President for certain purposes therein mentioned.

In Bennett *vs.* Hunter, after holding that payment could be made up to the time of sale, the court add:

> But to whom did the right to make this payment belong? The obvious answer is, to the owner, either acting in person or through some friend or agent compensated or uncompensated. The terms of the act are that the owner or owners may pay, and it is familiar law that acts done by one in behalf of another are valid if ratified, either expressly or by implication, and that such ratification will be presumed in furtherance of justice. But it is insisted that the right of payment is limited by the act to the actual owner in his own proper person. But we perceive no such limitation in its terms. On the contrary, the fact that the privilege of redemption after sale is limited to the owner or the loyal person having a lien or other interest appearing in proper person, and taking a prescribed oath, appears to us to afford an irresistible inference that the right of payment before sale was not so limited (p. 338).

When the court say that "the terms of the act are that the owner or owners may pay," they have reference, as is submitted, to the third section, to which the seventh section also refers for the manner of payment.

And when the court say that they perceive no limitations in its terms to payment *by the owner in his own proper person*, it would seem that the extract above given from the amendment of 1863 was not under consideraation.

This extract should be construed in harmony with the above decision.

Let us inquire, then, as to the object of the amendment: Originally, the commissioners were authorized to strike off the property to the United States at the amount of the taxes, penalty, costs, and interest. They had no power to bid more. In place of this authority the amendment gave the power to bid off the same for the United States, at a sum not exceeding two-thirds of the assessed value, "in all cases where the owner shall not, on or before the day of sale, *appear in person* before said commissioners and pay the tax," &c., "or request the same to be struck off to a purchaser at a sum less than two-thirds of the assessed value thereof." Both extracts relate to a sale to the *United States*. It will be seen that the authority of the commissioners to *bid for the United States* was coupled with the non-appearance of the owner in person, and his not doing certain acts prescribed; and that it depended upon these facts. This seems to have been the object of the amendment. The appearance of the owner in person was not required by the original act, and in that act there was no authority to the commissioners to bid any amount in excess of the taxes, penalty, interest, and costs.

To reconcile the decision in Bennett *vs.* Hunter with this amendment requires a distinction between sales made to an individual, and sales under the authority of this amendment to the United States. It was contended in Bennett *vs.* Hunter that to defeat a sale to a private individual, the owner should appear in person. But the court said that they saw no such limitation in the terms of the act. When we look at the act closely, this appears to be so in reference to sales made to a private individual. But it can scarcely be suggested that there is no such limitation upon a sale under the authority conferred by this amendment. For the act is *express* that the commissioners shall have such authority unless the *owner appear in person;* whilst the section as amended says, in language that cannot be misunderstood, that where the *owner* does not *appear in person* and pay the tax, &c., or request the same to be struck off to a purchaser at a less sum, the commissioners shall be authorized to bid off the same for the United States.

What is meant by this request? It cannot be contended that it could be made by any other than the owner in person. It may be difficult to perceive its object. Still being in the act it must have a meaning. It seems to intend that if the owner appear in person he may have the privilege of defeating this special authority of the commissioners, by simply requesting them to strike the property off to another purchaser *at a less sum.* Here is evidently an inducement held out to him so to appear. He could defeat this authority by either paying the taxes, costs, and interest *without a penalty*, or by asking the commissioners to strike it off to a friend upon like condition. Is it not manifest that for some purpose the *appearance in person* of the *owner* was desired by the government: *perhaps*, as leading to a *permanent submission* upon his part to its lawful authority? Is it not manifest, too, that where there is not this appearance of the owner *in person* the commissioners have authority to bid *for the United States?* They might not have the authority to sell to an *individual* in any case where a tender of taxes had been made in behalf of the owner, but it seems plain that they had express authority to *bid for the United States* in all cases, unless the owner appeared in person. This construction of the amendment and this distinction are in harmony with the decision of the Supreme Court.

It will be observed that the amended section also gives the commissioners authority to purchase in certain cases under the direction of the President. This is an additional authority, and the fact that the commissioners have it does not militate against the authority that they had under the amendment we have been considering. They acted within the authority of both provisions.

The author of the amendment to the seventh section of the act was Senator Doolittle. It was introduced on the 26th day of January, 1863, and in the Congressional Globe of that date, at page 508, will be found the following colloquy:

> Mr. Fessenden. I wish the Senator from Wisconsin would give me an exposition of one particular phrase here which I do not understand. It is in the twenty-second and twenty-third lines of the amendment:
>
> "Or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots of ground."
>
> What do these words in the connection in which they are used mean?

Mr. Doolittle. I understand the meaning to be this, that if the owner appears in his own person and proposes to redeem the land, he can do so by paying the tax; or if he appears in person and requests the same to be struck off to some other third person he may do so; the object of the act being to require the owner to appear in person before the commissioners; these commissioners to be within the lines of our army.

Mr. Fessenden. What is the necessity for the words, "for a less sum than two-thirds of the assessed value of said several lots or parcels of ground?"

Mr. Doolittle. If he requests it to be stricken off for a less sum than two-thirds, then the commissioners are not authorized to bid up to two-thirds of the assessed value for the United States. I will state to the honorable Senator that the purpose is to authorize the commissioners if they see a piece of land which might be sacrificed at just the amount of the tax, and they choose to bid it up to two-thirds of its assessed value they can do so. If the owner appears in person, or requests some other to bid for him before the commissioners, he can do so.

Mr. Fessenden. Might he not under that request the land to be struck off for less than the taxes?

Mr. Doolittle. Oh, no, sir. There is a provision in a previous part of the amendment that in no case shall it be struck off for less than the taxes.

Mr. Fessenden. I see it now.

Upon the meaning of this provision, the court say, in Turner *vs.* Smith, 14 Wall., 553:

> The first and the second [acts of 1862 and '63] are alike in the provision that the land shall be sold to the highest bidder, for a sum not less than what is due on it for the tax, interest, and cost. This in both cases refers to *bids by others than the United States.* In reference to bids made by the commissioners on behalf of the United States there is a change. * * * The second statute makes a material change in this part of the law. When the owner does not pay or request the same to be struck off to a purchaser for a less sum than two-thirds of its value, the commissioners are authorized to bid off the same to the United States at a sum not exceeding two-thirds of such assessed value.

IX.

As to the *Eleventh* assignment of error:

A vital question for the jury, in view of the law laid down by the court, was, whether it had been the invariable rule and practice of the tax commissioners, during the time between the advertisement of property for sale and the sale itself, to refuse to receive taxes, &c., upon such property, unless tendered by the owner in person. Whether at the time of the sale of the property in question, January 11, 1864, such a rule and practice had been established as invariable, was a controverted question of fact. The evidence strongly tended to show that before this time there had been but one or two instances of such a refusal, and there was no evidence to show that this had been done by the board acting as such, but only by one of the commissioners acting individually (pp. 90, 91, 102). There was no evidence that such action had been approved by a majority of the board. There was no written rule or written evidence of such a practice upon the subject. To prove that such a rule had been adopted action *by the board* should have been shown, and not a declaration by a single member merely, made, perhaps, casually, in the street or elsewhere.

A tender should have been made to the board as such, and action thereon should have been had by the board as such, before it could be said that an improper ruling had been made. The court instructed the jury that the burden of proof was upon the plaintiff to establish the existence of such a rule, and that two instances were not sufficient for that purpose (106, 107). To overcome this difficulty, the plaintiff, was allowed to show what the practice was at a time *subsequent* to the sale of the Arlington estate, for the purpose of proving that such had been the practice *before*. It was then claimed that because Hawxhurst stated that *he* had acted upon the same theory from the beginning, a corresponding rule was thus established.

Again, in order to prove this practice, Jefferson Tacey, a witness for the plaintiff, was permitted, under objection and exception, to testify as follows (p. 94:)

> They refused to receive the taxes from any one but the owner, or a party in interest in the property. This conviction was produced from conversations which occurred in the office, and from a general report in the community. It was generally known.

This was manifestly hearsay, the reception of which upon the most material question of fact in the case ought to result in a reversal of the judgment, and the granting of a new trial.

X.

In support of the *Twelfth* assignment of error:

It will be seen by sections 16, 17, and 25, ch. 131, Code of Virginia, above, p. 6, that in an action of ejectment against several defendants, if a joint possession be proved, the verdict shall be against all; but if the defendants occupy distinct parcels in severalty or jointly, and other defendants possess other parcels in severalty or jointly, the judgment shall be against the defendants severally for the parcels held by one or more of the defendants separately from others, and the verdict must describe each part particularly held by such several defendants.

After the evidence was all in, and it had been proved that the defendants held severally (p. 82), by reason of which a joint verdict could not be rendered, the plaintiff asked that the action might be discontinued as to all but two, and upon this being allowed by the court, he subsequently sought to charge upon these the occupation of the whole premises.

Now, the instruction asked for (p. 121) was substantially in the language of the statute, and the refusal was plainly erroneous. The charge given, at the instance of the plaintiff (p. 121), upon this point is erroneous, because it assumes that there was evidence that Strong and Kauffman were in the occupation or possession of whatever they had general charge over as officers of the United States. It does not make the proper distinction between occupation as intended by the statute, and a general charge over those who were in the occupation, and it conveys the idea that such general charge or superintendence was sufficient; and it was upon this the jury must have found their verdict against these defendants for the whole. These difficulties are not remedied by the instructions given on p. 122. Such instructions are in direct conflict with the instruction on p. 121, which instruction, or rather refusal to instruct, however, was not withdrawn or explained. Both being in the case and before the jury, they must have had difficulty in understanding the rule by which they were to be governed. But, besides all this, there was a motion for a new trial, which was denied, and in reference to this point the evidence did not support the verdict. All the evidence hereupon will be found at pp. 81, 82, 110, 112, 113, 114, 115. The record shows that a second suit was commenced for a portion of this property against fourteen defendants (p. 114). The plaintiff charged these with being in the occupation of that portion in this second suit, and this charge has not been withdrawn.

On p. 81 the *plaintiff proved* that all the parties in the first suit were in the occupancy of the property; on p. 110 the plaintiff further proved the order of the War Department under which Strong was in general charge.

On p. 112 it is shown that the *houses themselves* upon the property are *owned* by the occupants, that the United States exercised no control over them, had no right to enter their premises, and that, as Strong testifies, "they occupy their premises *exclusively*, except that I have *supervising charge* over them." It is this "supervising charge" which was the basis of the instruction and the verdict.

XI.

As to the *Thirteenth* assignment of error:

The only proof of title by the plaintiff was a prior possession by the devisor, and the copy of the will of such devisor shown by the record of the probate court, the original will being lost. Neither the execution of the will nor its contents were proved by subscribing witnesses or otherwise. This was insufficient proof of legal title. The parties were not claiming from the same source, but from entirely independent sources (14 Wall, 563). The plaintiff relied upon prior possession alone without showing any color of title. In such case it has been held in Virginia that mere prior possession is not sufficient to make even a *prima facie* case against a party obtaining possession and claiming from an entirely independent source (see 5 Munf., 374). Special attention is called to the circumstances under which the United States came into possession as recited in the prayer for instruction (pp. 107, 108).

As to the insufficiency of the proof of the execution and contents of the will, see Darby's Lessee *vs.* Mayer (10 Wh., 465).

Upon the whole, it is submitted that the judgment of the court below should be reversed, with a direction to dismiss the cause for want of jurisdiction, or otherwise to grant a new trial.

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